

1 UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF NEW YORK

3 -----x
4 UNITED STATES OF AMERICA,
5 Plaintiff,

04-CR-1016
(NGG)

6 versus

United States Courthouse
Brooklyn, N.Y. 11201

7 RONELL WILSON,

8 Defendant.
9 -----x

November 27, 2012
9:00 A.M.

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11 TRANSCRIPT OF CRIMINAL CAUSE FOR HEARING
12 Before HON. NICHOLAS G. GARAUFIS,
UNITED STATES DISTRICT JUDGE

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21 produced by Computer-aided Transcription
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Proceedings

1 (In open court.)

2 (Defendant present in open court.)

3 COURTROOM DEPUTY: All rise. The United States
4 District Court for the Eastern District of New York is now in
5 session. The Honorable NICHOLAS G. GARAUFIS is now presiding.

6 (Honorable NICHOLAS G. GARAUFIS takes the bench.)

7 COURTROOM DEPUTY: Calling CRIMINAL CAUSE FOR
8 HEARING in Docket No. 04-CR-1016, United States of America
9 against Ronell Wilson.

10 Counsel, please note your appearances for the
11 record.

12 MR. McGOVERN: For the United States of America,
13 Assistant United States Attorney Celia Cohen and James
14 McGovern. With us is Special Agent Keltar Mui and Veronica
15 Ramirez.

16 Good morning, Your Honor.

17 MR. BURT: Michael Burt, Colleen Quinn Brady and
18 David Stern for the defendant. With us is Mayerlin Ulerio

19 THE COURT: Good morning. Please be seated.

20 All right. We'll resume with the witness's
21 cross-examination. I remind the witness that he is still
22 under oath.

23 You may proceed.

24 MR. BURT: Your Honor, one housekeeping matter.
25 Yesterday I identified the binders that the experts had relied

Proceedings

1 upon and marked them as C1 through 4 and discovered afterwards
2 that there are actually two more binders. So I've now marked
3 them C1 through 6 and would move those into evidence at this
4 point. I don't believe there's any objection to that.

5 THE COURT: Any objection to C1 through 6?

6 MS. COHEN: No objection, your Honor.

7 THE COURT: Are these Defense Exhibits C1 through 6?

8 MR. BURT: Correct.

9 THE COURT: Defense Exhibits C1 through 6 are
10 received in evidence without objection. Thank you very much.

11 (Defendant's Exhibit C-1 to C-6 received in
12 evidence.).

13 THE COURT: Mr. Stern.

14 MR. STERN: We talked yesterday about Mr. Wilson's
15 problem with not being fed.

16 THE COURT: Yeah.

17 MR. STERN: And it's documented on his record that
18 he has acid reflux. So this morning he didn't have anything
19 to eat. Last night, he got back at 9:30. For him to eat, he
20 has to take a pill, then wait a half hour, then eat, then wait
21 two hours. So we need -- by "we" I don't mean you, but we
22 need somehow to figure out how to get him fed, because this is
23 a long day for all of us. I'm not complaining about it. But
24 he has to be taken care of somehow. So we just need to find
25 a solution for it. If we can get him food here, that's fine.

Proceedings

1 They don't send him with his medication. So I'm not sure what
2 the solution is. I'm only sure what the problem is.

3 THE COURT: Well, why don't you -- I'm going to ask
4 the marshals to try to work something out so that you can
5 provide him with something from the cafeteria at the beginning
6 of the day, which you first have to show to the marshals to
7 make sure that it is acceptable. And today, we're going to
8 probably finish around 5:30, so he'll be able to get back for
9 dinner.

10 MR. STERN: Good. That's not a problem.

11 THE COURT: So what I would say is work it out with
12 the marshals, get him something like a sandwich or whatever
13 from the cafeteria that he can have in the morning, but it has
14 to be worked out with the marshals. I'm going to ask the
15 marshals to cooperate with that. But whatever it is that you
16 do has to be given to the marshals for them to examine. He
17 can have it in the back during the break. And that is the
18 best we can do.

19 MR. STERN: That sounds like a good solution. And
20 with your permission, at the first break, I'll go get him
21 something.

22 THE COURT: All right. Very good.

23 MR. STERN: Thank you.

24 THE COURT: Okay. Let's proceed then.

25 Ms. Cohen, let's keep going.

B. Shapiro - Cross/Cohen

1 CONTINUED CROSS-EXAMINATION

2 BY MS. COHEN:

3 Q Good morning, Dr. Shapiro.

4 A Good morning.

5 Q Since we spoke last night, have you discussed your
6 testimony with anyone?

7 A I have talked about some of the concerns that I had with
8 Mr. Burt.

9 Q And this was since you've been on the stand during
10 cross-examination; is that correct?

11 A I'm sorry, I didn't hear you.

12 Q And this is since last night, correct?

13 A This was last night, after I left.

14 Q And yesterday, during direct examination, you talked
15 about the fact that individuals with mental retardation -- I
16 think you used the term they walk the walk, but they can't
17 talk the talk. Do you recall that?

18 A Yes.

19 Q And this is because people with mental retardation seem
20 on the outside, right, to be normal, correct?

21 A People at the higher levels of intellectual disability
22 very much appear to be typical, yes.

23 Q Right. Because you said you can't tell just from seeing
24 someone, right?

25 A Right.

B. Shapiro - Cross/Cohen

1 Q And you might have a conversation with that person during
2 a cocktail party. Do you recall that testimony?

3 A In terms of being more specific, at the level of
4 superficial conversation that most of us engage in most of our
5 lives, you're not going to be able to tell.

6 Q Right. And that's because when you really dig down into
7 the conversation, that's where we can see the difference,
8 right?

9 A Right.

10 Q And you've --

11 A In the areas of reasoning and generalization and
12 extraction.

13 Q Right. And you said you might ask someone with mental
14 retardation if they like -- I think you gave an example of a
15 rock band, right?

16 A Yes.

17 Q Did you give a specific rock band? I'm sorry, I didn't
18 catch that yesterday.

19 A No, I didn't, because I'm out of that.

20 Q But generally, music, right?

21 A Correct.

22 Q And the person would be able to say which band they
23 liked, but they wouldn't be able to answer the why, right?
24 Why do they like the band?

25 A Right. To be able to talk about the characteristics of

B. Shapiro - Cross/Cohen

1 what it is that they liked about the band. And then you might
2 follow it up with another question: Well, what about this
3 band? They have a similar kind of -- type of music. And, you
4 know, what do you think about this singer as opposed to that
5 singer. You know, typical conversation. Then you would kind
6 of go into greater detail in terms of other things to see how
7 well the concept is generalized.

8 Q Right.

9 Well, let's -- you know that Mr. Wilson is a
10 prolific E-mailer, right?

11 A Yes.

12 Q In fact, in this case, we have over 7,000 pages of
13 E-mails, right?

14 A Correct.

15 Q And you also indicated in one of the adaptive functioning
16 boxes that Mr. Wilson is illiterate, right?

17 A Correct.

18 Q Mr. Wilson is not illiterate, right?

19 A I said that he was illiterate.

20 Q So someone who is illiterate can get on E-mail and write
21 paragraphs and paragraphs of E-mails?

22 A The definition of literacy is being able to pick up the
23 New York Daily News and read it for information. So people
24 who may not be fully literate may be able to do those kinds
25 tasks.

B. Shapiro - Cross/Cohen

1 Q They may be able to read a newspaper?

2 A No. One of the definitions of literacy is to be able to
3 read the newspaper for information.

4 Q Okay.

5 A People with a lower level of educational performance --
6 that's roughly somewhere between fifth and sixth grade in
7 terms of where literacy is set. Someone with a reading
8 ability of around fourth grade may still be able to construct
9 simple sentences and string them together in what looks like a
10 paragraph but in fact, when you look at it, is not really
11 well -- not really a paragraph, but rather just a stream of
12 consciousness in terms of a series of simple sentences that
13 are just linked together and giving the appearance that that
14 is a paragraph, but it's not.

15 Q Okay. But someone who has trouble putting sentences
16 together could also have trouble because of a learning
17 disability, correct?

18 A Correct.

19 Q And they might have trouble with their vocabulary, a
20 person with a learning disability, correct?

21 A Correct.

22 Q Someone with a learning disability, just one I'm familiar
23 with, dyslexia, they might have words -- the letters are not
24 in the right spot, right?

25 A That's a common misconception, but yes, that's the common

B. Shapiro - Cross/Cohen

1 thought.

2 Q That's a layman's term of dyslexia, I think, right?

3 A Actually, what it is when people reverse their letters,
4 it's because they don't understand what the letters really
5 mean. So it's another example of lack of meaning causing a
6 behavior that then may be perceived as specific as a specific
7 syndrome.

8 Q Okay.

9 Now, another difference, and I don't know, is
10 someone who is illiterate probably would not be able to read
11 and apply what they're reading perhaps to another situation.
12 That might be something that's a little higher level of
13 thinking; is that right?

14 A It depends on what the reading level is.

15 Q But applying a concept, an abstract concept to something
16 else would be a little bit more difficult, correct?

17 A Applying an abstract concept in a concrete fashion or
18 applying an abstract fashion? I'm sorry. I'm not trying to
19 be difficult.

20 Q Well, let's take both.

21 A I don't understand your question.

22 Q Let's --

23 THE COURT: Don't over speak the witness. Wait
24 until he's finished with his.

25 MS. COHEN: Sure, Your Honor.

B. Shapiro - Cross/Cohen

1 BY MS. COHEN:

2 Q You asked me if I was to clarify whether I was talking
3 about applying an abstract concept to an abstract -- to
4 another abstract area.

5 A Correct.

6 Q That's something that's difficult not only for someone
7 who's illiterate but also someone who's mildly mentally
8 retarded, correct?

9 A Correct.

10 Q And there may be cases -- it's a little bit easier to
11 apply an abstract concept to a concrete concept, correct?

12 A Correct.

13 Q But it still takes quite a bit of reasoning, right?

14 A I don't know how much reasoning it takes, because what
15 may happen is they may incorporate it as a rule and then walk
16 around with a bunch of rules in their pocket and apply the
17 rule when they think it's appropriate, and sometimes it is,
18 and sometimes it isn't quite right; and that's one of the ways
19 that you may be able to pick that up after a substantial
20 behavioral observation.

21 Q Okay. Well, we're talking very abstractly, so let's take
22 a look at some of these E-mails.

23 You gave the example of music before. We just
24 discussed that.

25 MS. COHEN: Can we have what's marked as Bates No.

B. Shapiro - Cross/Cohen

1 -- and I'm going to mark this as an exhibit as well -- 3302.

2 The government is going to mark this as Government Exhibit 1.

3 Your Honor, the government has marked these in paper
4 with the exhibit tabs. The ones that are showing on the
5 screen do not have the exhibits on them, but I will keep these
6 separate and give a pile in the end, keep our exhibits
7 together.

8 THE COURT: Do I have a copy of that Exhibit?

9 MS. COHEN: I can hand up copies now as we go along,
10 and it's also coming up on the screen.

11 THE COURT: Yes, but I'd like a paper copy.

12 MS. COHEN: Sure. And I can hand defense counsel a
13 paper copy as well.

14 THE COURT: And the defense has the exhibits,
15 correct?

16 MR. BURT: I have them electronically, yes, Your
17 Honor. Thank you so much.

18 THE COURT: Government Exhibit 1?

19 MS. COHEN: Government Exhibit 1, correct.

20 THE COURT: Are you moving that into evidence?

21 MS. COHEN: We are. We can do it subject to
22 connection, if necessary.

23 MR. BURT: No objection.

24 THE COURT: All right. Government Exhibit 1 is
25 received in evidence without objection.

B. Shapiro - Cross/Cohen

1 (Government's Exhibit 1 received in evidence.)

2 BY MS. COHEN:

3 Q Now, drawing your attention, Dr. Shapiro, to this
4 paragraph, which I'm going to circle on the screen. We'll get
5 into this further before we go ahead, but are you aware some
6 of these are -- these are all Mr. Wilson's E-mails from the
7 MDC. This E-mail, in particular, was to a person who he was
8 operating a Facebook page remotely through. So that's why
9 these appear a little bit different. We'll talk about that
10 later.

11 But particularly going to the second sentence of
12 this, we can start above there. "It's good to just hear from
13 you, my G. We repped it. And we're older now so things are
14 getting different. At the same time so is the music. Good
15 looking because the goal is for the music to be universal so
16 everybody can vibe to it, black, white, young and old. Like I
17 said, we're working on it. We're working on it together."

18 Dr. Shapiro, in this E-mail, Mr. Wilson is
19 describing what it is about music that he likes or how music
20 has changed, correct?

21 A He's stringing together a series sentences. I'm not
22 exactly sure where he's going with this. If I had to do a
23 rough approximation of the level of the language that's
24 contained in this communication, it probably would be at the
25 lower end of middle school.

B. Shapiro - Cross/Cohen

1 Q Okay.

2 But the point here is that he does say things are
3 getting different, right?

4 A He says that, correct.

5 Q And then he applies that to music, to the concept of
6 music, correct? "At the same time so is the music," he says.

7 A Okay. Yes.

8 Q And then he says "because the goal is for the music to be
9 universal," right?

10 A He says that, yes.

11 Q And then he describes what he means by that, right? He
12 says "so everybody can vibe to it, black, white, young and
13 old."

14 So in that sentence, he's applying -- he's
15 explaining what it means to be universal, right?

16 A He's saying that, yes.

17 Q Now, this is one of those concepts that we were talking
18 about in applying one situation to another, right? That
19 somebody with mental retardation can't dig down. Isn't that
20 what he's doing here?

21 A I don't know.

22 Q All right.

23 A This could simply be repeating an ad that was on a rock
24 music station that he had heard and wanted to incorporate into
25 his communication with somebody. So I really can't say.

B. Shapiro - Cross/Cohen

1 Q Right. Now, if he had come up with this on his own, that
2 would be different than copying it, obviously, right?

3 A Right. And that's why you would not need to go off of
4 E-mail but actually do this in part of the evaluation in terms
5 of being able to try to discern what the ideology is for
6 the -- where the statement is coming -- from where the
7 statement is coming.

8 Q Right. Because somebody with mental retardation would
9 have trouble explaining these kinds of concepts, correct?

10 A They could repeat this kind of statement where they may
11 have heard it someplace else.

12 Q Okay. Now, let's talk about another example. I'll just
13 stick with music for a moment, and then we'll move on.

14 MS. COHEN: I'm going to take a look at -- this
15 document is Bates numbered 1149. Now, I'm anything to mark
16 this as Government Exhibit 39.

17 Your Honor, this Bates number is out of order only
18 because I missed it and had to go back when I was premarking
19 them. So I just want to make that clear.

20 THE COURT: All right, Government Exhibit 39. Are
21 you moving that into evidence?

22 MS. COHEN: Yes, Your Honor.

23 THE COURT: Any objection?

24 MR. BURT: No, Your Honor.

25 THE COURT: Government Exhibit 39 is received into

B. Shapiro - Cross/Cohen

1 evidence without objection.

2 (Government's Exhibit 39 received in evidence.)

3 BY MS. COHEN:

4 Q Now, I'm going to draw your attention, Dr. Shapiro, to
5 the last paragraph.

6 By the way, before we get into this -- actually,
7 that's fine. We'll read this. It starts out. This is from
8 just this past July. "Sweetheart, I do not understand fully
9 how you think I feel. You don't know the answer to that
10 because you still think I'm like every other dude in your past
11 life. That's what's wrong with a lot of women nowadays. See,
12 when a real dude, such as myself, come along and want to do
13 right, y'all just find something or make a person feel some
14 type of way, shy away from love. I've been there. Trying to
15 get over something as it is. I'm in here. I feel like I
16 shouldn't be in no relationship because of what y'all can do
17 and me sitting here. It real hurts when you can't" --

18 THE COURT: Could you stop for one second. You're
19 reading too fast.

20 MS. COHEN: Sorry.

21 "How you want to" --

22 MR. BURT: Excuse me, Your Honor, I have an
23 objection, which is counsel is reading this, but the record is
24 not going to reflect the changes between the abbreviations.
25 For instance, the word "too" is not T-O-O it's, the number

B. Shapiro - Cross/Cohen

1 two. And as counsel is reading this, she's using -- not
2 making any reference to those sorts of changes. So it's a
3 little bit misleading the way it's being read.

4 THE COURT: Well, it's being read in, but the
5 exhibit itself is the evidence, and her rendition of it is
6 simply the way it sounds when you read it. So the best
7 evidence is the exhibit, and that's what I will utilize.

8 MR. BURT: Yeah. And that's fine. I just didn't
9 want somebody reading this record some day to hear her
10 question and say, well, that sounds all grammatical and
11 everything is spelled properly, when she's doing some
12 interpretation. So as long as we understand that there are
13 differences, I think that's --

14 THE COURT: Yeah. It's more like a tweak than like
15 a -- how you would write in a novel, for instance.

16 MR. BURT: Right.

17 THE COURT: There's a lot of shortcuts in this kind
18 of communication. So your point is made. It's in the record.

19 MR. BURT: Thank you.

20 THE COURT: And anyone who reviews the record should
21 understand that the actual document has many of these
22 shortcuts that may not be reflected in the transcript.

23 MR. BURT: Thank you very much. Appreciate it.

24 THE COURT: You're very welcome.

25

B. Shapiro - Cross/Cohen

1 BY MS. COHEN:

2 Q Okay. So I'll pick up here.

3 THE COURT: And just go slowly, please.

4 MS. COHEN: Sure.

5 BY MS. COHEN:

6 Q "I feel like I shouldn't be in no relationship as it is
7 because of what y'all can do and me sitting here. It really
8 hurts when you can't be there. How you want to for the
9 person. You're willing to give a chance with. And when I do,
10 I just fall on my face looking for someone to help me pick up
11 the pieces. You know that song by Force MD's called Tears.
12 You know, go look it up after this missive, because I feel
13 like that all the time.

14 Dr. Shapiro, this E-mail, Mr. Wilson is talking
15 about his feelings, correct?

16 A He's talking about his feelings, correct.

17 Q And he's talking -- and then when he talks about the
18 Force MD's song called Tears -- did you see that part?

19 A Yes, ma'am.

20 Q Are you familiar with that song?

21 A No, ma'am.

22 Q Neither was I. But I looked up the lyrics, and we can
23 look at the lyrics, although the lyrics themselves obviously
24 don't -- aren't important to the case, but they do talk about
25 exactly what Mr. Wilson is saying. For example, part of the

B. Shapiro - Cross/Cohen

1 lyrics say --

2 THE COURT: Stop. Are you going to -- how do we get
3 the lyrics into this hearing? I know that this is not before
4 a jury, but there still has to be some foundation for putting
5 something in the record. How do we do that, in your view?

6 MS. COHEN: Well, Your Honor, let me ask a different
7 question, and then -- without getting into the specific
8 lyrics.

9 THE COURT: Go ahead. I'm just saying that if
10 you're going to put the lyrics in the record, you've got to
11 have some way of putting it in the record that comports with
12 the rules of evidence.

13 MS. COHEN: Right.

14 BY MS. COHEN:

15 Q If these lyrics described emotion and tears falling
16 because of emotion -- let's just hypothetically say that it
17 did -- that would be something that shows that this person,
18 that Mr. Wilson is applying lyrics to his own situation,
19 right?

20 A Yeah. And so does every other ballad and every country
21 song.

22 Q There are a lot of songs about emotion, correct?

23 A And unrequited love, yes.

24 Q Right. And in this one, Mr. Wilson chose a specific
25 song, correct?

B. Shapiro - Cross/Cohen

1 A Correct.

2 Q Now, he does this again.

3 MS. COHEN: And I'm going to show what's been
4 marked -- what's been Bates numbered 497, and I'm marking this
5 as Government Exhibit 2.

6 Let's take it out of the music concept for a second
7 and move on to another -- the same idea but without music.

8 You also talked about someone with mild mental
9 retardation wouldn't necessarily be able to describe why they
10 like a certain person, correct?

11 A I'm sorry, could you repeat the question?

12 Q You testified on direct examination yesterday that a
13 person with mental retardation might not be able to describe
14 why or how it is that they like a person, correct?

15 A I don't think so.

16 Q Well --

17 A I don't think I said that is what I'm saying. Could you
18 put that in context for me, please?

19 Q Sure. I don't have the transcript from yesterday. But
20 it would be the same thing as music, right? Someone likes a
21 band, but they can't say why. So in the same vein, someone
22 with mild mental retardation wouldn't be able to describe --
23 they wouldn't be able to dig down and describe why they like a
24 person, right?

25 A They might describe certain characteristics of the person

B. Shapiro - Cross/Cohen

1 that they like and that might be interpreted as saying they
2 know the reason why they like somebody. But when you start
3 talking about the abstract qualities, like trustworthiness,
4 loyalness, thriftiness, et cetera, that may give them more
5 difficulty, yes.

6 Q Okay. Well, let's take a look at this E-mail, which has
7 now been marked as Government Exhibit 2?

8 THE COURT: Are we putting that in the record?

9 MS. COHEN: Sorry?

10 THE COURT: Are we putting that in the record?

11 MS. COHEN: Yes. I'm offering this as Government
12 Exhibit 2.

13 THE COURT: Any objection?

14 MR. BURT: No objection.

15 THE COURT: Government Exhibit 2 is received in
16 evidence without objection.

17 (Government's Exhibit 2 received in evidence.)

18 THE COURT: Go ahead.

19 MS. COHEN: Thank you, Your Honor.

20 BY MS. COHEN:

21 Q I'm going to skip to the middle of it. "We," in
22 parenthesis, "need to have the thing together. Away you go,
23 take my words out of my mouth of what you do to me. Really
24 it's your eyes that's ever so sleepy, your smile that makes me
25 say, damn, I want to make this woman the happiest woman

B. Shapiro - Cross/Cohen

1 alive."

2 In that E-mail, Mr. Wilson is describing to a woman
3 what he likes about her, right?

4 A Her physical characteristics of her eyes and her smile,
5 correct.

6 Q And what it makes him feel inside when he looks at her
7 smile and her eyes, right?

8 A Correct.

9 Q This goes really beyond what I think you said before --
10 I'm not sure on direct examination yesterday, but you've used
11 the words when you testified in Davis "beyond the veneer,"
12 correct?

13 A No.

14 Q So your testimony is this is on the surface; is that
15 right?

16 A Your assertions may not be correct.

17 Q So in your opinion, this is very much a surface
18 description?

19 A It may very well be because you can get into something
20 like suppose, for example, that when he was writing these
21 specific things that are there, "it's your eyes that ever so
22 sleepy, your smile that makes me say, damn, I want to make
23 this woman the happiest woman alive," that could have very
24 easily been lifted from a song and just put in there.

25 Q Now, you also realize that Mr. Wilson does not have

B. Shapiro - Cross/Cohen

1 access to the internet, right?

2 A Yes.

3 Q He doesn't have Google, right?

4 A Correct.

5 Q Now, if it wasn't lifted from a song and he created this
6 himself, that would be going beneath the veneer, right?

7 A Possibly.

8 Q Well, let's look at another description. You testified a
9 minute ago that another way in which you could tell someone
10 has mild mental retardation is that when they describe a
11 person, they might not describe concepts like honesty,
12 correct? Do you recall that?

13 A Yes.

14 Q This is marked Bates No. 2736.

15 MS. COHEN: Your Honor, for some reason, I didn't
16 have the printout of this, so I'm going to mark this as
17 Government Exhibit 2A. I apologize, I don't have copies of
18 this in paper, but we will get a copy to the Court.

19 THE COURT: It's in your binder, is that it?

20 MS. COHEN: Yes. These have all been produced. I
21 can pull it out of the binder.

22 We will mark this as Government Exhibit 2A. And the
23 government moves this exhibit into evidence. I will hand up a
24 copy to Your Honor.

25 THE COURT: All right.

B. Shapiro - Cross/Cohen

1 Are those binders there additional binders for the
2 Court?

3 MR. BURT: Those are copies of Defense Exhibit C1 to
4 C6.

5 THE COURT: These are for the witness in case the
6 witness need to refer to them?

7 MR. BURT: Yes.

8 THE COURT: Thank you. Government Exhibit 2A?

9 MR. BURT: I haven't seen it, but I don't think I
10 have an objection to it.

11 THE COURT: Why don't you take a look at it, sir, so
12 we're all on the same page.

13 Any objection?

14 MR. BURT: No, Your Honor.

15 THE COURT: 2A is received in evidence without
16 objection.

17 (Government's Exhibit 2A received in evidence.)

18 BY MS. COHEN:

19 Q So I'm going to draw your attention to this paragraph and
20 I'm going to -- oh, actually, I'm going to go back for a
21 moment. I need to put this into context.

22 The question posed by the woman who E-mails
23 Mr. Wilson is "I asked you about what you like in a woman."
24 And Mr. Wilson describes that as "I like in my woman just to
25 be real, honesty, loyalty, respect and make it all about me

B. Shapiro - Cross/Cohen

1 and her and kid or kids, if any, and understand my situation
2 and how much she may have to do to make the things work out
3 for the better for us while I'm in here doing the same."

4 In that E-mail Mr. Wilson is using some of those
5 qualities you mentioned to describe what he likes about women,
6 correct?

7 A Well --

8 Q Why do you see it differently?

9 A He's using a list of words. There's no evidence there
10 that he understands what those words mean.

11 Q Okay. But then he expounds on that, and he says he wants
12 to make it about them, right? About him, her or potentially
13 kids. And have her understand his situation, right? Is that
14 correct?

15 A That's what it says, yes.

16 Q That's what it says. And that goes to loyalty, correct?

17 A Correct.

18 Q And how much she may have to do to make the things work
19 out. That would be the quality of being real, correct?

20 A The quality of being?

21 Q Being real. Being true.

22 A I don't know what you mean by "real."

23 Q Being real to the situation, true.

24 A Okay. Yes.

25 Q All right.

B. Shapiro - Cross/Cohen

1 Now, another example of something someone with mild
2 mental retardation might have trouble doing is explaining what
3 something like a quote is, right? Like something that is a
4 quote -- strike that.

5 A quote from someone would be easy for someone with
6 mild mental retardation to copy, right?

7 A And anybody else.

8 Q And anybody else, right. Even if the quote is pretty
9 high up there. When I say "high up," pretty analytical or
10 deep, right? Just to copy it.

11 A Right. You're just copying the words.

12 Q And where we get into more analytical thinking is if
13 somebody can explain what a quote really means, right?

14 A Yes.

15 Q And understand it, right?

16 A Correct.

17 Q And apply it to another situation, correct?

18 A Correct.

19 Q Well, let's take a look at Government -- sorry, Bates
20 No. 5856, which has been marked as Government Exhibit 3.

21 MS. COHEN: We'll offer this into evidence.

22 (Handing.)

23 THE COURT: Any objection?

24 MR. BURT: No, Your Honor.

25 THE COURT: Government Exhibit 3 is received into

B. Shapiro - Cross/Cohen

1 evidence without objection.

2 (Government's Exhibit 3 received in evidence.).

3 MS. COHEN: Thank you, Your Honor.

4 BY MS. COHEN:

5 Q Going down to the first E-mail here from Mr. Wilson, he
6 quotes, "There are two ways of exerting one's strength. One
7 is pushing down. The other is pulling up." The person he
8 E-mails with answers back, "Brew, what are you saying in this
9 last E-mail?" And there are multiple question marks. "I'm
10 trying to read between the line, but I don't want to unless
11 you clarify it. Love you, Bro."

12 So this person he's E-mailing with clearly does not
13 understand this quote, correct?

14 A Correct.

15 Q And then Mr. Wilson responds back, "I'm saying, pull,
16 show your strength. All you have to do is the two. That's
17 what I said, but let me look into the Booker T. book I'm
18 reading."

19 So Mr. Wilson is explaining what he means by that
20 quote, correct?

21 A Incorrectly.

22 Q This is his interpretation, right?

23 A Yes.

24 Q And his interpretation is, hey, pull, show your strength.
25 All you have to do is the second one. One is pushing down,

B. Shapiro - Cross/Cohen

1 the other is pulling up, right? And the second one, the
2 pulling up, is the good one, right?

3 A That's your interpretation. That's not what's written.

4 Q Well, he's saying all you have to do is the two. So
5 you're interpreting the two as something else; is that what
6 you're saying?

7 A All I'm saying is that he may be, and I don't know,
8 saying that there are two ways of exerting, and all you have
9 to do is the two. And I'm not sure where that takes you.
10 This is an incomplete thought. And it then goes on to say,
11 "Let me look into the Booker T. book I'm reading." So he may
12 well be using that resource to help get the explanation,
13 because I think he was struggling with the explanation for
14 that.

15 Q Because this is a quote from Booker T. Washington. Do
16 you recognize it?

17 A No.

18 Q The Booker T. book?

19 A Well, that's what I assumed.

20 Q So he's going to go back and look at the book is what
21 he's saying.

22 Okay. Well, let's take another quote. Let's look
23 at Bates No. 3227, which has been marked as Government
24 Exhibit 4.

25 MS. COHEN: And the government will move this into

B. Shapiro - Cross/Cohen

1 evidence. (Handing.)

2 THE COURT: Any objection?

3 MR. BURT: No objection, Your Honor.

4 THE COURT: Government Exhibit 4 is received in
5 evidence without objection.

6 (Government's Exhibit 4 received in evidence.).

7 MS. COHEN: Thank you, Your Honor.

8 BY MS. COHEN:

9 Q Focus down here (indicating). So first this is a quote
10 from Theodore Roosevelt, a very famous quote: "In a moment of
11 decision, the best thing you can do is the right thing to do.
12 The worst thing you can do is nothing." Theodore Roosevelt.
13 Mr. Wilson expounds on that in the next part of this. "It's
14 like we always want to do the right thing, but some do the
15 wrong thing when we do not make a decision about what to do.
16 Decisions have power. Decisions have force. They usually
17 take us to the exact place we need to be. You made the right
18 decision, making sure you have a warm home to rest your head
19 peacefully. You are good."

20 Mr. Wilson is describing what the Theodore Roosevelt
21 quote means to him, correct?

22 A I can't speak to what Mr. Wilson was thinking when he
23 wrote this.

24 Q Well, you don't know what he was thinking, but you know
25 what he wrote, right?

B. Shapiro - Cross/Cohen

1 A I know what he wrote, correct, because you showed it to
2 me.

3 Q And what he's written is something that explains what the
4 quote means, right?

5 A I don't think it's a correct explanation of the quote.
6 And then he kind of goes off and talks about a bunch of
7 associational pieces relating to decisions.

8 Q He's telling the person that that person made the right
9 decision because the decisions usually take us to the exact
10 place we need to be, right?

11 A He said that, yes.

12 Q And in this case, the decision was to make sure this
13 person had a warm home to rest his or her head, correct?

14 A Correct. But I fail to see how that relates to the
15 quote, which is to say -- which speaks to the issue of
16 indecision or not making a decision. So consequently, I think
17 this is probably an example of somebody who is using a quote
18 in a not quite correct fashion, which would not be atypical
19 for someone with intellectual disability.

20 Q Okay. Well let's turn then to another area.

21 Now, by the way, we're now into the field of
22 adaptive functioning, correct? That's what we're talking
23 about here today? Because that's where we have -- I mean, you
24 say they can't talk the talk, right?

25 A Well, adaptive behavior in this particular case is not

B. Shapiro - Cross/Cohen

1 independent of cognition.

2 Q Right. They overlap. I guess that's why I started with
3 a broader concept, and that's what you were doing yesterday.

4 A I would say they interact.

5 Q Definitely. Let's sort of move in then into the adaptive
6 functioning. Let's categorize these now. In addition to
7 being cognitive functioning, it's also in the part of adaptive
8 functioning, we're talking about the DSM of communication
9 accident correct?

10 A Correct.

11 Q All right. Because communication is the ability to
12 comprehend and express information, correct?

13 A Correct.

14 Q And specific examples of communication -- again, this is
15 from the DSM -- include the ability to comprehend and/or
16 receive a request, an emotion, a comment, a protest or
17 rejection, right? That's from the DSM?

18 A I don't have it in front of me, and I don't have it
19 memorized.

20 Q We can actually pull out your report, Defense Exhibit A,
21 Tab 2. It's Page 9 of your report. Just so you have the
22 definition in front of you.

23 A Okay, I'm with you now.

24 Q This is a very long definition, but at the end it says
25 higher level skills of communication, e.g., writing a letter,

B. Shapiro - Cross/Cohen

1 would also relate to functional academics, correct?

2 A That's what it says, yes.

3 Q Now, under communication -- sorry.

4 If you go a little bit forward in your report to
5 page 19, the bottom of 19, top of 20, your notes in your
6 report indicate that Mr. Wilson has a deficit in communication
7 because he has poor vocabulary, could not undertake a serious
8 conversation, could not follow multi-step directions and did
9 not understand humor, correct?

10 A That is what it says, yes.

11 Q Now --

12 A I should also note that is based on Dr. Olley's report.

13 Q Okay. But you took Dr. Olley's report and formed an
14 opinion, correct?

15 A Correct.

16 Q And that opinion was he has a deficit in communication,
17 correct?

18 A Correct. And it's based on the information that was
19 contained in Dr. Olley's report.

20 Q But you also reviewed the records in this case, correct?

21 A Correct.

22 Q Now, the ability to understand humor is another
23 high-level -- well, it depends on the level of humor as to
24 whether it would be a high level of thinking, correct?

25 A The ability to understand -- let me ask you to repeat it

B. Shapiro - Cross/Cohen

1 and expand on that question, because I'm not sure what you're
2 saying.

3 Q Sure.

4 Humor can be very simple for a child in some
5 instances, right?

6 A Correct.

7 Q For example, a knock-knock joke, right?

8 A Yes.

9 Q But then there are jokes that we tell as adults, right?

10 A Yes.

11 Q And a lot of those jokes require a higher level of
12 thinking, correct?

13 A Correct.

14 Q And that's because in some jokes, you have to apply an
15 abstract concept to maybe a totally different situation and
16 make it funny, right?

17 A Correct.

18 Q And often I would imagine that people with mild mental
19 retardation aren't really what you'd call witty, correct?

20 A Correct.

21 Q So let's take a look at what's been Bates marked as 70610
22 and I've marked as Government Exhibit 5.

23 MS. COHEN: The government moves this into evidence.

24 MR. BURT: No objection.

25 THE COURT: All right. Government Exhibit 5 is

B. Shapiro - Cross/Cohen

1 received in evidence with no objection.

2 (Government's Exhibit 5 received in evidence.)

3 MR. BURT: Your Honor, just to keep the record
4 straight, when counsel is referring to Bates stamp numbers in
5 this series of documents, she's not referring to the GOV
6 numbers that are in the defense exhibits is my understanding.
7 This is their own Bates stamp numbering system. I just didn't
8 want there to be confusion about that.

9 THE COURT: Is that right?

10 MS. COHEN: That is correct, Your Honor.

11 THE COURT: Where do we have the documents that are
12 Bates stamped with the government's Bates stamps?

13 MS. COHEN: Where do we have them?

14 THE COURT: Are they part of the record or are they
15 simply something within the government's exclusive control?

16 MS. COHEN: We produced them to defense counsel. We
17 have not moved all of them into evidence. I've been moving
18 them piecemeal.

19 Give me one moment, please.

20 At the end, to make the record complete, we'll mark
21 them separately, each binder, as exhibits. I think there are
22 nine binders, Your Honor.

23 THE COURT: Well, the question would then become
24 whether there was an objection to the materials in all nine
25 binders being introduced into evidence. For the time being,

B. Shapiro - Cross/Cohen

1 let's go forward with your numbering that you're utilizing,
2 and we'll address at the end whether the rest of the materials
3 should be in or not or whether some of them should be in. But
4 the point that Mr. Burt is making is that the Bates stamp
5 numbers are not part of the record at the moment.

6 MR. BURT: Correct.

7 MS. COHEN: Thank you, Your Honor.

8 BY MS. COHEN:

9 Q Now, in this document, the person corresponding with
10 Mr. Wilson sends him an E-mail and says, "So, did you miss me,
11 baby," she asks. And he responds, "Is Bill Gates rich?"

12 That was a joke, right?

13 A Yes.

14 Q And that kind of a joke isn't a knock-knock joke, right?

15 A That is not a knock-knock joke. There are no
16 knock-knocks there.

17 Q And that kind of joking takes a higher level of thinking,
18 correct?

19 A No.

20 Q Well, you'd have to know who Bill Gates is, right?

21 A Correct.

22 Q You have to know that he's rich?

23 A Correct.

24 Q You have to know that you can't argue with that, right?

25 A But you could just be repeating something that someone

B. Shapiro - Cross/Cohen

1 says. Telling a joke is not what I'm talking about when I'm
2 talking about humor. It's understanding the joke.

3 Q Okay. But clearly --

4 A Particularly when you're doing it in verbal form or
5 written form, because you have no idea in terms of the origin
6 of that information.

7 Q So you're saying that if Mr. Wilson saw this joke, it
8 wouldn't be abstract thinking, correct?

9 A It may not be.

10 Q But if he made it up himself, it would be, correct?

11 A Right.

12 Q And in fact -- withdrawn.

13 Now, let's go on to another one then.

14 MS. COHEN: This is -- these are a little out of
15 order. This is marked as Government Exhibit 5180 -- sorry,
16 not Government Exhibit. Bates No. 5180. The government has
17 marked it as Government Exhibit 7, and we move this into
18 evidence.

19 MR. BURT: No objection.

20 THE COURT: Government Exhibit 7 is received in
21 evidence without objection.

22 (Government's Exhibit 7 received in evidence.).

23 BY MS. COHEN:

24 Q Now, on the bottom, Government Exhibit 7, you note the
25 date is 5-6-2012. You know what the date 5-6 is, correct,

B. Shapiro - Cross/Cohen

1 Dr. Shapiro?

2 A No, I don't.

3 Q Well, the date of 5-6, that's Mr. Wilson's birthday.

4 A Thank you.

5 Q And the person who E-mailed him tells him to "rise and
6 shine, it's workout time, LOL." He E-mails back and says,
7 "Good morning, baby girl. I'm taking a day off, because it my
8 party, and I cry if I want to."

9 This is Mr. Wilson's birthday, and he's using the
10 song It's My Party and I'll Cry If I Want To, right?

11 A Correct.

12 Q And he's using it in a different situation, in his
13 situation, and making it funny, correct?

14 A Yes.

15 Q So these are E-mails. I also want to now play a phone
16 call.

17 MS. COHEN: Now, Your Honor, these phone calls have
18 been provided to defense counsel. I am going to mark -- and
19 these phone calls are not all of Mr. Wilson's phone calls.
20 They are an excerpt -- all of the phone calls have been
21 produced in discovery. We are just going to move into
22 evidence particular phone calls on one CD and play a few of
23 them.

24 THE COURT: Has that been provided to the defense?

25 MS. COHEN: Yes, Your Honor.

B. Shapiro - Cross/Cohen

1 THE COURT: What is the exhibit number?

2 MS. COHEN: This will be Government Exhibit 50.

3 THE COURT: Has the defense received this exhibit?

4 MR. BURT: I have, Your Honor.

5 THE COURT: Any objection?

6 MR. BURT: We do have an objection, which is my
7 understanding is that these phone calls are all post arrest,
8 and they are far removed from the time of the crime where the
9 Court's opinion is focused us in terms of intellectual
10 disability. And I think the witness has testified that the
11 standards are that verbal behavior in a custodial situation is
12 simply not relevant. So the objection would be to relevancy,
13 a 403 objection.

14 MS. COHEN: Your Honor, these are highly relevant
15 because, as the witness testified yesterday, reasoning and
16 abstract thinking are very difficult for someone with mild
17 mental retardation to learn, no matter what the environment
18 is. That's not something that a structured environment can
19 teach you. It's something inherent in our brains. And it's
20 the exact reason why all of their experts went to speak with
21 Mr. Wilson and exactly why they gave them the tested proverbs,
22 because proverbs test the exact same thing that we're showing
23 in these E-mails and these phone calls.

24 THE COURT: Well, I think that the defense's
25 objection can be termed as an argument against giving these

B. Shapiro - Cross/Cohen

1 any weight --

2 MS. COHEN: Right.

3 THE COURT: -- but that they may be relevant. The
4 extent to which they are relevant, the Court will decide
5 later. The objection is noted and overruled and subject to
6 further review of the Court as to whether these -- whether
7 this evidence has -- should be given any weight in reaching a
8 determination.

9 MR. BURT: Thank you.

10 THE COURT: Go ahead.

11 THE WITNESS: Your Honor, can we take some time to
12 use the facilities?

13 THE COURT: Sure. Let's take a 10-minute break.

14 (Whereupon, a break was taken.)

15 (Continued on the next page.)

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B. Shapiro - Cross/Cohen

1 THE COURT: All right. Bring in the defendant,
2 please, and the witness may retake the stand.

3 (Witness retakes the stand.)

4 On the record? All right. Mr. Stern?

5 MR. STERN: Yes, sir?

6 THE COURT: You've resolved the issues about the
7 food?

8 MR. STERN: We have. Thank you very much. We got
9 him stuff from downstairs and he's good.

10 THE COURT: All right. Good to go.

11 The witness is reminded he's still under oath.

12 THE WITNESS: Yes, sir.

13 THE COURT: Thank you for your patience, everyone.

14 You may continue your cross-examination. Can you
15 give me a sense about how much more you have for this witness,
16 time-wise.

17 MS. COHEN: Yes. Sure, Your Honor. I have -- I
18 think I have about a half-hour, 45 behind minutes.

19 THE COURT: And on direct, what can I expect from
20 Mr. Burt, do you think?

21 MR. BURT: Probably about an hour, maximum.

22 THE COURT: Okay. And you have your next witness
23 lined up?

24 MR. BURT: He's outside, ready to --

25 THE COURT: This afternoon?

B. Shapiro - Cross/Cohen

1 MR. BURT: Yes.

2 THE COURT: Very good. Let's move on.

3 MS. COHEN: Thank you. One thing I wanted to
4 correct on the, record, I had -- when we were talking about
5 the IQ, all the different IQ tests yesterday, we were referred
6 to the Exhibit C-4. I just want to correct the record,
7 because of the corrections this morning. There are six
8 binders now. It's actually C-5.

9 THE COURT: Binder C-5, you need?

10 MS. COHEN: Binder C-5 contains all the prior IQ
11 tests, and all the references from yesterday to C-4 should
12 have been C-5.

13 THE COURT: Okay.

14 MS. COHEN: And one other -- I'm sorry -- that I had
15 forgotten. Defense counsel and I spoke this morning about
16 marking the marked-up chart from yesterday. Whether or not
17 they will agree or disagree, just to make the record complete,
18 that when we marked up the record yesterday, the chart we were
19 going to mark that as Government Exhibit 44.

20 THE COURT: That was your marking of the chart?

21 MS. COHEN: My markings. They don't to have to take
22 that --

23 THE COURT: All right.

24 MS. COHEN: -- just mark it for the record.

25 THE COURT: For that limited purpose, do you consent

B. Shapiro - Cross/Cohen

1 to putting it in the record?

2 MR. BURT: Yes, Your Honor.

3 THE COURT: All right. Government Exhibit 44, which
4 is the marked up chart, is received in evidence with that
5 limitation, that it contains markings that were made by
6 counsel -- by government's counsel during the course of the
7 cross-examining this witness.

8 (Government's Exhibit 44 received in evidence.)

9 Would you just tap the microphone?

10 MS. COHEN: Okay.

11 THE COURT: The other one?

12 MS. COHEN: Other one? Testing.

13 THE COURT: All right.

14 MS. COHEN: Yeah. Can you hear me now?

15 THE COURT: Keep that up a little now.

16 MS. COHEN: That one doesn't work?

17 THE COURT: All right.

18 MS. COHEN: There we go.

19 THE COURT: Okay. Thank you. May proceed, Ms.

20 Cohen?

21 MS. COHEN: Thank you, Your Honor.

22 BY MS. COHEN:

23 Q In right before the break, we were talking about humor.

24 Do you recall that, Dr. Shapiro?

25 A Yes.

B. Shapiro - Cross/Cohen

1 Q Now, I'm going to play a phone call between Mr. Wilson
2 and a woman. This is from last March.

3 THE COURT: Does it have a number? I mean, this is
4 an exhibit, I take it?

5 MS. COHEN: This is on the CD.

6 THE COURT: All right.

7 MS. COHEN: And that is Government Exhibit 50.

8 THE COURT: All right. It's on 50. And does it
9 have a separate marking of any kind or identification. Is
10 there a date and a time?

11 MS. COHEN: Yes, the date and the time, April 3rd,
12 2012. Sorry, I said March.

13 THE COURT: April 3rd, 2012?

14 MS. COHEN: Yes. That's correct.

15 THE COURT: Go ahead.

16 (Audio played in open court.)

17 MS. COHEN: Your Honor, is the sound on in the
18 courtroom?

19 THE COURT: It's definitely on. The question is,
20 how loud is it?

21 MS. COHEN: It's on.

22 THE CLERK: It's on as loud.

23 MS. COHEN: You want to try it again?

24 THE COURT: (Confers with the clerk.)

25 MS. COHEN: We tested the equipment yesterday, Your

B. Shapiro - Cross/Cohen

1 Honor.

2 THE COURT: No, no, no. It's got to be checked.
3 Believe me, you need to check this equipment almost hourly.

4 (Audio played in open court.)

5 MS. COHEN: Go ahead.

6 (Audio played in open court.)

7 BY MS. COHEN:

8 Q Okay. So, Mister -- sorry, excuse me -- Dr. Shapiro, in
9 that conversation, Mr. Wilson talks about the fact that he's
10 turning 30. Did you hear that?

11 A No. All I heard is him say he's turning 30. I'm sorry.

12 Q He's turning 30?

13 A All right.

14 Q And the woman answered back and said or the woman
15 indicated that she was older than him?

16 A I didn't hear.

17 Q We can play it again?

18 A I'm sorry. It's my hearing.

19 Q Yeah. Yeah. Let me describe it first and then you can
20 hear it again.

21 A Okay.

22 Q And in response, he said, well, I like my women like I
23 like my money and my wine. We can play this again.

24 MS. COHEN: Just play it. Veronica. Speed it up.
25 Start it a little bit later.

B. Shapiro - Cross/Cohen

1 (Audio played in open court.)

2 BY MS. COHEN:

3 Q Did you hear it that time, Dr. Shapiro?

4 A Yes, I did. Thank you.

5 Q Mr. Wilson is making a joke in this instance, right?

6 A Yes.

7 Q And he's taking the concept of old money and wine that
8 needs to be aged and he's comparing it to what he likes -- how
9 he likes his women, correct?

10 A That's your interpretation.

11 Q Okay. And you're speculating as to what else he might be
12 saying, correct?

13 A Correct.

14 Q I mean, you said in a lot of these examples that I gave,
15 you said you have to talk to him and understand what he meant
16 by something, right?

17 A Right.

18 Q But you didn't sit down and talk to him about any of
19 these emails, correct?

20 A Correct.

21 Q You didn't sit down and talk to him about any of these
22 phone calls, right?

23 A Correct.

24 Q And you do realize the stakes are important in this case,
25 correct?

B. Shapiro - Cross/Cohen

1 A Very much so.

2 Q Now, let's listen to another one of those, then.

3 MS. COHEN: Can you play it, the next one?

4 BY MS. COHEN:

5 Q By the way, before we play this, unlike the email, in
6 this instance, we can actually tell how quickly Mr. Wilson
7 comes up with a joke, correct?

8 A Yes.

9 Q Because he is responding instantly, right?

10 A He's responding quickly, yes, but you don't know, whether
11 this was an association again.

12 Q So but he's actually applying it correctly in the correct
13 situation, right?

14 A Well, not to quibble with you, but I don't know that he
15 necessarily implied there was age involved with wine or money.

16 Q You don't think he implied that?

17 A I don't know.

18 Q It was just coincidence that he came up with two things
19 that show appreciation of age, is that what you're saying?

20 A I didn't appreciate it on the first pass. I assume that
21 was the thing.

22 Q I'm sorry. Can you repeat that?

23 A When he first said it, I did not appreciate the
24 relationship to age.

25 Q You didn't appreciate that liking older women is like

B. Shapiro - Cross/Cohen

1 liking aged wine?

2 A No, I didn't.

3 Q But you agree that the concept is the same, right? As
4 you age, some women in his view get better, and as wine ages,
5 it gets better, right?

6 A Yes.

7 Q Okay. Let's play this one?

8 THE COURT: All right. Before you play it, is there
9 a date associated with this?

10 MS. COHEN: Yes, Your Honor.

11 THE COURT: Is this also in Government Exhibit 50?

12 MS. COHEN: Government Exhibit 50.

13 THE COURT: And the date of the recording?

14 MS. COHEN: Yes. July 14th --

15 MS. RAMIREZ: 2012.

16 MS. COHEN: 2012.

17 THE COURT: All right. Go ahead.

18 (Audio played in open court.)

19 MS. COHEN: Doctor, I don't know if it would help if
20 you want to come a little closer to these. I know that it was
21 difficult to hear.

22 THE COURT: Do you want to step down?

23 THE WITNESS: That would help.

24 THE COURT: Please. You may do so.

25 MS. COHEN: Okay. I'll explain what this says and

B. Shapiro - Cross/Cohen

1 then you can listen to it again.

2 BY MS. COHEN:

3 Q He's talking to somebody who's saying here -- he's
4 talking to somebody and he comes back and says, "Excuses are
5 like assholes. Everybody's got one."

6 (Audio played in open court.)

7 BY MS. COHEN:

8 Q I mean, in this conversation, Dr. Shapiro, the person?

9 THE COURT: Just hold on a second. No, Dr. Shapiro,
10 let him retake the witness stand before you ask him a
11 question.

12 MS. COHEN: Oh, sure.

13 THE COURT: Take your time, sir.

14 (Witness retakes the witness stand.)

15 THE COURT: All right.

16 MS. COHEN: I only have two other phone calls in the
17 whole cross to play.

18 THE COURT: That's all right. Go ahead.

19 BY MS. COHEN:

20 Q In this conversation, the person speaking with Mr. Wilson
21 is explaining -- giving excuses as to why she couldn't come to
22 visit. Did you get that?

23 A Yes.

24 Q And he's coming back with a joke: "Yeah. Yeah. Excuses
25 are like assholes. Everybody's got one." That was a joke,

B. Shapiro - Cross/Cohen

1 right?

2 A That's a common phrase that everyone uses.

3 THE COURT: That's -- excuse me. That's a common
4 phrase that everyone uses?

5 THE WITNESS: Not -- I mean, let me restate that.
6 I'm sorry. That is a common phrase that's used not
7 infrequently.

8 THE COURT: You're familiar with that phrase?

9 THE WITNESS: Yes.

10 BY MS. COHEN:

11 Q Okay. The key here is that Mr. Wilson is using it in the
12 appropriate situation, right?

13 A Yes.

14 Q And that's something that you said yesterday is difficult
15 for somebody with mild mental retardation, right?

16 A In what context, please?

17 Q Well, it requires a level of abstract thinking, right?

18 A Yes.

19 Q I mean, often he's explaining -- he's taking his concept
20 of excuses and putting it into a joke, right?

21 A I'm sorry. I didn't hear the question.

22 MS. COHEN: Strike that. We made the point.

23 THE WITNESS: Okay.

24 BY MS. COHEN:

25 Q Now, another aspect of communication that you talked

B. Shapiro - Cross/Cohen

1 about in your report, one of the other deficits is that was an
2 inability to undertake a serious conversation. And that's
3 again, in your chart there -- could not undertake a serious
4 conversation.

5 And in fact, you've already seen a few emails in
6 which Mr. Wilson did undertake a serious conversation,
7 correct?

8 A (No response.)

9 Q Let me defer your attention. When he talked about his
10 emotions with the one woman and he compared that to a song
11 "Tears," do you recall that?

12 A Yes.

13 Q Mr. Wilson actually doesn't appear to have any difficulty
14 engaging in a serious conversation. Let's take Bates number
15 3005.

16 MS. COHEN: The government is marking this
17 Government Exhibit 8. Did you pass that already? Exhibit 8.
18 (Hanging.)

19 THE COURT: Government Exhibit 8, any objection?

20 MR. BURT: No, Your Honor.

21 THE COURT: Government Exhibit 8 is received into
22 evidence without objection.

23 BY MS. COHEN:

24 Q Okay. Now that this is up on the screen, let's focus on
25 this paragraph that I circled. I circled a little wider at

B. Shapiro - Cross/Cohen

1 that time. Okay.

2 I'm going to direct you to Mr. Wilson's email.

3 "Yeah. The feeling is the same. In a degree, the aspect of
4 missing you and the old days, but we can't change the past.

5 All we have now is the now. So let's make it last. Please

6 don't cry. It's not tears of joy, which it may be, but I

7 don't like to see you cry. Because when you cry, I cry, (we

8 cry together.) However, I appreciate the gesture, but how

9 would it look if I take money" -- money is indicated with a

10 symbol -- "from you and you ain't on your mo way of living."

11 Mo is the person he's emailing with. That's her

12 email address is mo.

13 "Your mo way of living. I hope I'm not offending

14 you in any way. At this time, my morals won't allow me to

15 accept money from you right now, but when you get on your

16 feet, all to have do is Western Union money to me. You're

17 looking good as a mother still. Grandma My Butt."

18 This email touches on a few things in adaptive

19 functioning. First, this is a serious conversation, correct?

20 A No.

21 Q Is this a serious conversation?

22 A I said no. I think that this is cocktail talk and not

23 what I consider to be a serious conversation.

24 Q Okay.

25 A And it expresses a good deal of emotion, and I'm not

B. Shapiro - Cross/Cohen

1 meaning to imply that he's not expressing strong feelings
2 here, but it's at a superficial level.

3 Q Okay. But again, you haven't spoken to Mr. Wilson about
4 this email, right?

5 A That is correct.

6 Q And you have to -- whether or not it's superficial, it's
7 certainly a serious subject matter, right?

8 A The subject matter is serious.

9 Q Right. And in fact, we'll get this to this later when we
10 talk about other adaptive functioning domains, but the ability
11 to understand money is often a problem and something you cited
12 with Mr. Wilson as being a problem, right?

13 A That's correct.

14 Q And Mr. Wilson in this email, not only is he talking
15 about his emotion -- emotion, but he's turning down money,
16 correct?

17 A Correct.

18 Q He's turning down money because this person, he feels,
19 can't afford it right now, right?

20 A Correct.

21 Q And that's when this person gets on her feet, she could
22 then send him money, right?

23 A That's what he said.

24 Q All right. We'll discuss what that means.

25 A But that does not mean that he has an understanding of

B. Shapiro - Cross/Cohen

1 money.

2 Q Okay. Well, he's?

3 A In the broader sense of that term.

4 Q But even when you talk about money, you talk about
5 knowing when to save and when to spend and not being impulsive
6 about it, right?

7 A And being able to budget, et cetera.

8 Q But here, he is not being impulsive. He is
9 understanding, you know what? I can't take this money from
10 you, right?

11 A Correct. That's what he said.

12 Q He's using his judgment, too, correct?

13 A Yes.

14 Q Now, let's look at -- skip around a little bit. Bates
15 number 5702.

16 MS. COHEN: And this is going to be marked as
17 Government Exhibit 10.

18 THE COURT: All right. Government Exhibit 10, any
19 objection?

20 MR. BURT: No objection.

21 THE COURT: I'm sorry. I didn't hear.

22 MR. BURT: No objection.

23 THE COURT: Okay. Thank you.

24 No objection. Government Exhibit 10 is received
25 into evidence, without objection.

B. Shapiro - Cross/Cohen

1 (Government's Exhibit 10 received in evidence.)

2 BY MS. COHEN:

3 Q Okay. Just look at -- whoops. I'm sorry -- this is an
4 email from August of 2011. It says, "The joint is called
5 Fighting For Your Life, by John something."

6 Mr. Wilson is referring to a book in that case. Oh,
7 let me, by the way, give you some background here. At this
8 time, Mr. Wilson was -- this was a sad time in their family.
9 An aunt had died at this time. And this is what the rest of
10 the email is commenting on.

11 A And he was still in jail at this time?

12 Q Yeah. And he's talking to his sister.

13 A Okay.

14 Q "I hope you feel better, because like I told Vanessa,
15 everything is looking at y'all with strength. Everyone" --
16 excuse me -- "Everyone is looking at y'all for the strength.
17 Through this time, I know it's big, but God only puts us
18 through things he knows we can handle. I'm still at a loss
19 because it didn't really sit yet that my haunt will never be
20 here to tell people off and protect me from everyone and keep
21 me on track, and I feel it's too much to handle. Like the MJ
22 song, I told to you play, all we have to do is call her name
23 and talk, because I know she'll show me a sign or something.
24 Well -- again, I tell you -- again, I tell you just stay
25 strong. We'll get through it together and no one can stop

B. Shapiro - Cross/Cohen

1 that. Before I forget, I told Vanessa -- Vanessa that she can
2 share our mother or -- sheer our mother even, though she won't
3 replace hers. Is that is that okay with you? Which I know it
4 is because you're just like me."

5 And his sister responded, as you can see above, "Wow
6 Bernetta would be so proud of us because we both said the same
7 exact thing."

8 And this another example of a serious conversation,
9 correct?

10 A How old is the sister in this one?

11 Q This is his older sister he's corresponding with.

12 A And how old is she?

13 Q Currently, mid -- I'm not sure.

14 A Because I think that the exhibit really demonstrates the
15 difference between a serious conversation and an associational
16 conversation, because I think that if you compare the answer
17 to the work of Mr. Wilson, as you can see a substantial
18 difference in the complexity of the thought that's being
19 communicated there.

20 Q Well, clearly, his sister has much better grammar than he
21 does, correct?

22 A But it's not just the grammar. It's not just the
23 spelling. It's not just the sentence structure, all of which
24 is substantially less well developed in Mr. Wilson than in
25 another adult, but rather -- and I'm assuming this is an

B. Shapiro - Cross/Cohen

1 adult --

2 Q Yes.

3 A Because this was done --

4 Q Yes?

5 A -- in 2011. This is one not one of the earlier ones.

6 But when you compare that to the thought that's
7 expressed, I think that his sister's is much more organized
8 and much more complex than the information that he's provided.

9 Q Yes. Now, if you look at Mr. Wilson's, though, he
10 says -- this before he hears a response: "I told Vanessa she
11 can share our mother, even though she won't replace ours."
12 And if you look up, DePetra, his sister says, "I told Vanessa
13 they could share our mother, although no one could replace
14 theirs. Aren't they saying the exact same thing?

15 A No. At least in terms of the content is similar, but
16 they're not saying exactly the same way. To me, it doesn't
17 reflect the same degree of thought.

18 Q The same degree of thought is, your mother's no longer
19 here, but you can share ours. That offers cover to someone,
20 right?

21 A And that's something that a ten year old might very well
22 say.

23 Q Okay. Well, then DePetra goes on and says that she told
24 Henry, "I also told Henry that me, you and him no longer have
25 our greatest protector, that we're going to have to protect

B. Shapiro - Cross/Cohen

1 each other."

2 Now, he told her earlier -- Mr. Wilson said, "I told
3 Vaness, everyone is looking at y'all for the strength through
4 this time. I know it's big. God only puts us through things
5 he knows we can handle."

6 He's talking about the same thing, right, that we
7 have to -- we can all be there to support each other, and that
8 we're going to get through this. Isn't that what they're all
9 saying here?

10 A Would you take the yellow off.

11 Q Oh, sure.

12 A The yellow off -- up and down off it, because I'm losing
13 it.

14 So could you repeat your question?

15 Q Actually, let me go on. Let me withdraw that for a
16 minute, because I think this is easier to look at.

17 "I'm still lost, because it didn't really sit yet
18 that my aunt will never be here to tell people off and protect
19 me from everyone, and to keep me on track."

20 DePetra is responding to same thing, that she said,
21 that we don't have our greatest protector any more here.
22 They're talking about the same thing, right?

23 A They're talking about the same subject, but they're
24 talking about it quite differently.

25 Q Okay. Well, then, he compared it again, the situation,

B. Shapiro - Cross/Cohen

1 he said -- he compared it to a song, right?

2 A He does that a lot, apparently, in the emails that you
3 have been showing me, compares lots of things to songs.

4 Q And actually, DePetra went ahead and listened to that
5 song, because she said, "I played your song and I cried,"
6 right?

7 A Correct.

8 Q So he's applying the song -- the emotions in the song to
9 the same -- to the situation that's going on with them, right?

10 A I think that he's using music to guide his life.

11 Q Hum. Well, he's certainly -- that's not really the
12 question. Is he taking a song and being able to interpret the
13 emotion from it correctly?

14 A Yes. But then the question that you have to ask is what
15 age can you do that.

16 Q Okay. Well, these are some things, though, that we were
17 talking about yesterday that apply reasoning, abstract
18 thinking, right?

19 A Correct.

20 Q And those are things that are tested in IQ scores in an
21 early age, correct?

22 A Correct.

23 Q So those things are something that is are inside, part of
24 our intellect? That was one of your slides, right?

25 A Yes.

B. Shapiro - Cross/Cohen

1 Q Now, let's talk --

2 A Can I respond?

3 Q I didn't -- I just asked you yes or no question.

4 A Okay.

5 Q You answered the question.

6 A Okay.

7 Q So let's move on.

8 On Bates number 2690, I'm sorry. Yes. 2690,

9 Government Exhibit 10.

10 THE COURT: We already have a ten. That's 5702.

11 MS. COHEN: Oh, I'm sorry. I mismarked this
12 exhibit. Government Exhibit 11. I'm sorry. Let's give this
13 10A. Actually, I did mark it as 10A, I realized. I'm sorry.
14 Okay. 10A, 2690. You have that? (Handing.)

15 Okay. Is there any objection?

16 THE COURT: Any objection?

17 MR. BURT: No objection.

18 THE COURT: All right. Government Exhibit 10A is
19 received in evidence, without objection.

20 (Government's Exhibit 10A received in evidence.)

21 BY MS. COHEN:

22 Q Okay. Let's take a look at the top part. And again,
23 this on not only serious conversation, but also the ability to
24 really -- well, let's look at it first, and then we'll talk
25 about it.

B. Shapiro - Cross/Cohen

1 "Baby girl, this why I don't like this email thing."

2 Oh, I'm sorry. Let's just go back for context, below that.

3 This one says, "Okay. Don't talk to me like that, please. I
4 just wanted to know. I won't ask anymore. I'll just wait to
5 receive." So clearly, she thinks he's angry with her.

6 He emails back, "Baby girl, this is why I don't like
7 this email thing. People may think you're being smart out of
8 the mouth" -- he spelled it wrong -- "and it's not like that.
9 That's why some things are better talk face-to-face or by the
10 phone."

11 In this conversation, not only is this a serious
12 issue, Mr. Wilson is understanding that words sometimes get
13 misinterpreted, right?

14 A Correct.

15 Q And that's something that would, again, be more difficult
16 for someone to understand because on the surface, what is the
17 difference in writing, right? But when you dig down, you
18 understand that there are differences. Sometimes some things
19 can come across incorrectly, correct?

20 A I'm sorry. I didn't understand the question.

21 Q Sometimes some things can come across like you're angry
22 in an email when you're not. That's what he's saying, right?

23 A Email?

24 Q Now, let's look at one more of these and then we'll move
25 onto another category.

B. Shapiro - Cross/Cohen

1 And by the way, as we're moving on, the category in
2 the DSM -- and we can sort of -- I know that there -- the DSM
3 and the AIDD -- wait, AAIDD -- are pretty much talking about
4 the same thing in adaptive functioning, but they categorize
5 them a little bit differently, right?

6 A It's not exactly the same thing, but they're similar.

7 Q Right. We have the conceptual, the practical and the
8 social with respect to the AAIDD, right?

9 A Correct.

10 Q And then we have the ten domains that you put in from the
11 DMS, right?

12 A DSM, yes.

13 Q And you could probably take a lot of these categories
14 from the DMS and put them into one of the three in the AAIDD,
15 right?

16 A Sometimes it's a little bit of -- a not exact fit, but
17 they're similar that yes, you can.

18 Q Okay. All right. But since you lay them out like this
19 in the different domains in the DSM, we'll stick with that for
20 now.

21 You mentioned social interpersonal skills is another
22 problem for Mr. Wilson, right?

23 A Correct.

24 Q And that social interpersonal skills relate to social
25 exchanges with others, right?

B. Shapiro - Cross/Cohen

1 A Correct.

2 Q Terminating and what, interacting and terminating
3 interaction with other others, right?

4 A Correct.

5 Q Executing and responding to pertinent situational --
6 should be clues, I think. It's course, but I think it's just
7 a typo.

8 A (Peruses document.) Yes. Clues.

9 Q Recognize feelings, right?

10 A Correct.

11 Q Foster in forming friendships, correct?

12 A Correct.

13 Q There are more. I know this is large. I just was giving
14 a summary.

15 And with respect to Mr. Wilson, you indicated that
16 he was childlike in his interaction, right?

17 A That was reported by his girlfriend, yes.

18 Q And he could not distinguish friends from acquaintances,
19 right?

20 A That was already reported in one of the notes, yes.

21 Q He's a social chameleon, assumes the conduct of the
22 group, right?

23 A Yes.

24 Q That also goes to the gullibility issue, is that -- or is
25 that something different?

B. Shapiro - Cross/Cohen

1 A That's something a little bit different. You may have to
2 be gullable in order to do that. But the social chameleon is
3 more out of a desire to belong.

4 Q Okay.

5 A And therefore, you'll assume -- you'll assume the
6 behavior and the mores of the group to which you choose to
7 belong.

8 Q Okay. And then he could not take the perspective of
9 another person, right?

10 A That was in his school records, correct.

11 Q And he could not resolve interpersonal issues on prison
12 work crew, right? That's what you said?

13 A To explain it a little bit further, yes, I said that. To
14 explain it a little bit further is that there was a note in
15 the -- his record that he had done a very good job in terms of
16 working on the cleaning while he was in prison. And while he
17 was in a structured situation and he did such a good job, that
18 they decided to make him foreman for the group because he was
19 doing his duties, dutifully, and he did a very good job at
20 that.

21 But then where the social interpersonal piece comes
22 in is that the other prisoners, other inmates, did not work,
23 and the way that Mr. Wilson chose to resolve the conflict was
24 to take all the work on himself.

25 Q Okay. So in this aspect, though, you are looking at

B. Shapiro - Cross/Cohen

1 his -- you're looking at what he does in prison here, correct?

2 A Correct. But it also refers to his interpersonal skills,
3 which I think still have problems.

4 Q Right. But in this instance, a lot of these adaptive
5 functioning domains, you're saying, hey, you can't look at
6 what he does in prison because it's structured, right?

7 A Correct.

8 Q But in this instance, you are looking at what he does in
9 prison, right?

10 A It was another example that persists to the present time.
11 I thought it was good example.

12 The records of full of instances where Mr. Wilson,
13 at an early age, would just not be able to resolve conflicts
14 with other children. So for example, when he was run into
15 difficulty in the classroom situation, he would act out.

16 Q Okay. Well, let's --

17 A One of things that was involved with his -- I'm sorry.
18 Sometimes I hesitate. You have to give me a little breath.

19 Q Sure.

20 A Some things one of the things that precipitated the
21 second admission to Elmhurst was that he spat on another child
22 --

23 Q Right.

24 A -- which suggests that he was having interpersonal and
25 social difficulties and not being able to resolve things, long

B. Shapiro - Cross/Cohen

1 history that persists at least until the time of the work
2 crew.

3 Q Okay. When he's spit on the girl's face, he was very
4 young, correct?

5 A It was enough to be considered one of major reasons why
6 he was being admitted to the hospital at that time.

7 Q Right. And that is also something that could happen with
8 somebody who is severely emotionally disturbed, correct?

9 A Correct.

10 Q Now, let's look at --

11 A But we also said that there's no specific behavior to
12 someone who has intellectual disability.

13 Q Wait. There's no -- sorry. Would you say that again?

14 A There's no specific behavior to someone who has
15 intellectual disability. People with intellectual disability
16 can exhibit the same range of behavior as everyone else in the
17 world.

18 Q My simple question is, that is also that could be caused
19 by emotional disturbance?

20 A Correct.

21 Q Bates --

22 THE COURT: Can I just clarify something?

23 In answer to this question, what was your answer?

24 Question counsel posed was, "Sometimes somethings can come
25 across like you're angry in an email when you're not. That's

B. Shapiro - Cross/Cohen

1 what he is saying, right?" And what was your answer to that?

2 THE WITNESS: I didn't have a chance to answer

3 because she went onto the next point, Your Honor.

4 THE COURT: Well, that's the reason why I asked you
5 the question, because I don't have an answer here that makes
6 any sense.

7 THE WITNESS: Okay.

8 THE COURT: So what is your answer?

9 THE WITNESS: My answer is yes. There's no emotion
10 in emails, so you can't tell that. So it's not infrequent for
11 people to think that you're angry in an email when in fact,
12 you're not.

13 THE COURT: Okay.

14 Try to wait for him to answer the question --

15 MS. COHEN: Sure.

16 THE COURT: -- so that I have a record. And there
17 was nothing really there. The answer that was on the line
18 was, answer, "Email." And I know that's not the answer. So
19 now we have an answer. Let's move on.

20 MS. COHEN: Thank you, Your Honor.

21 BY MS. COHEN:

22 Q Bates number 5772, which has been marked as Government
23 Exhibit 6. (Hanging.)

24 THE COURT: Thank you.

25 Any objection?

B. Shapiro - Cross/Cohen

1 MR. BURT: No, Your Honor.

2 THE COURT: Government Exhibit 6 is received in
3 evidence, without objection.

4 (Government's Exhibit 6 received in evidence.)

5 BY MS. COHEN:

6 Q Now, this email -- let me just bring it forward a
7 little -- touches on a few things here. Again, seriousness of
8 the conversation, and an ability to apply an abstract concept
9 to what's going. Okay? Let's see. I'll get the beginning.

10 "All I have to say" -- this is the second sentence
11 -- "all I have to say is no matter what you have, to stay
12 focused on your good and keep focused and in time, things will
13 get greater later. I have faith it will. Because we have
14 been through it all and it can't rain every day. The sun has
15 to shine some day. Like the saying goes, the sun shines on a
16 dog's ass every now and then. So with that said, I need and
17 want you to stay above the water out there, because there's
18 people out there waiting to say I knew she was going to fall
19 on her face. It's just like we meet -- just like with me in
20 here what they say -- what they don't know is that person
21 can't fall if he knows how to walk the right way. So walk the
22 right way and keep walking and watch things come together for
23 you."

24 Now, in that email, Mr. Wilson applied the abstract
25 concept of, hey, you know it can't always be bad. Things have

B. Shapiro - Cross/Cohen

1 to get better at some point, right?

2 A I'm having trouble with this, just in terms of just
3 reading it and understanding what he's trying to say.

4 Q Again, he didn't talk --

5 THE COURT: Let him finish his answer.

6 MS. COHEN: I'm sorry, Your Honor.

7 A Based on just the English there in terms of what's trying
8 to be communicated, so.

9 Q Are you finished?

10 A If I might just talk a little time to --

11 Q Oh, sure. Take as long as you want. Sometimes at the
12 end, you drop off, and I didn't hear you were still talking.

13 A (Peruses document.) Okay.

14 Q Okay. In this instance, Mr. Wilson is talking about the
15 fact that we all have we got to all have a good day sometime,
16 right?

17 A Correct.

18 Q And he's saying it in many ways. He's saying like, look,
19 it can't rain every day, right?

20 A He said that, it can't rain every day.

21 Q Right. And then he applies something that he's heard to
22 that, which means the same thing in a different with a
23 different phrase, right?

24 A There's a fair list of sayings that kind of go along with
25 this in terms of associational kinds of sayings that are

B. Shapiro - Cross/Cohen

1 there.

2 Q Right. But the ability to associate these things is
3 certainly a higher level of abstract thinking, right?

4 A Wrong.

5 Q Okay. So --

6 A We see this in autism all the time, for example.

7 Q Right. So he's -- so his ability to pull something out
8 from somewhere else and apply it correctly to the situation,
9 your testimony is that anybody, even people with mental
10 retardation can do that? Is that your testimony?

11 A To answer your question correctly, what I need to be able
12 to do is to tell you that this is not an absolute. So very
13 young children show some abilities to abstract.

14 And what you're putting forth is in terms of your
15 whole line of questioning, it seems to me, is this is an
16 absolute. So if he does this, then he can't have an adaptive
17 behavior deficit, and I think that misses the point.

18 What's happening is that I think that he has an
19 ability to abstract. It's a limited ability to abstract, and
20 and consequently, I think that it is substantially limited,
21 but it's not absent.

22 Q Okay. So here you're saying abstract thinking doesn't
23 get us out of mental retardation; however, things like not
24 having a bank account or not using a credit card are things
25 that would?

B. Shapiro - Cross/Cohen

1 A Those are things that are I encountered within the
2 adaptive behavior domain are manifestations are people who
3 have difficulty with cognition. There are other reasons for
4 those things, which is why when you asked me before whether or
5 not we would do adaptive behavior on somebody who didn't have
6 intellectual disability, and I said absolutely yes, because
7 you would then need to look into the answer in terms of why it
8 was the person was having that trouble.

9 So you're going to have a behavior, but then you
10 need a number of different ways of being able to explore why
11 that behavior is occurring. So you need to kind of understand
12 as best you can at a broad, at a deeper level, to understand
13 what the mechanism of that behavior is.

14 So someone may not have a bank account because,
15 number one, they may not have any money; number two, they may
16 not have a bank nearby that they can go to; number three, they
17 may not the cognitive abilities to do be able to do the
18 numbers associated with banking; number four, they may be
19 agoraphobic and not choose to go outside of their house. So
20 there are lots of reasons that you can say someone has no bank
21 account in addition to intellectual disability.

22 Q Absolutely. In fact, somebody might not have any money,
23 right?

24 A I said that as the first one.

25 Q Okay. And someone might not ever -- might not ever

B. Shapiro - Cross/Cohen

1 get -- because they have no money, they might not an ATM card,
2 right?

3 A Correct.

4 Q So there were a lot of factor, is what you're saying,
5 that go into this, right?

6 A Correct.

7 Q Okay. But in one of your slides yesterday, and I think
8 both on cross and on direct, you admitted that there are
9 certain things in our intellect, in people's intellect that
10 are inherent in there, and those things are tested in IQ,
11 right?

12 A That's too broad a question for me to answer directly.
13 What are the things that you're talking about, specifically?

14 Q Reasoning?

15 A Yes.

16 Q Executive thinking, right?

17 A Yes.

18 Q Those things are higher levels of thinking, right?

19 A Correct.

20 Q So whether or not you agree that these emails show that
21 on not, you are agreeing that those things are things that
22 people with mild mental retardation cannot do, correct?

23 A They may have difficulty with it, I think is what I
24 termed.

25 Q Let's go back to this email for a minute, because I just

B. Shapiro - Cross/Cohen

1 want to focus on some of the other aspects of it. One thing
2 and we'll get to this later is self-direction, right? That's
3 another problem you think Mr. Wilson has?

4 A Yes.

5 Q And in self-direction, that would encompass giving
6 direction to other people as well, right?

7 A No.

8 Q Okay. Well, telling somebody what to do in the
9 appropriate concept falls into some of these domains, right?

10 A Probably put it into the social interpersonal skills
11 domain.

12 Q Okay. So in this email, when he's telling this person,
13 hey, stay above water, right? He means, you know, keep your
14 head up. Keep going. Because there's people out there who
15 are waiting for you to fall on your face. Don't let them.
16 Right?

17 A He's being a supportive person, yes.

18 Q Yes. He's providing advice to another person, correct?

19 A Correct.

20 Q All right. Let's move on. Let me just play another
21 phone call. Again, along the same lines of somebody with
22 mental retardation, they may not be able to direct someone in
23 the same way that someone without mental retardation could do
24 that, correct?

25 A I don't like the term "direct," because what we're

B. Shapiro - Cross/Cohen

1 talking about is interpersonal interactions.

2 Q Right.

3 A So it's an interactional process where you have to be
4 able to put forth your desires or your needs or your demands,
5 and convince the other person to accept them. And then come
6 to -- or if they don't, then come to some sort of conclusion,
7 to how to resolve the differences.

8 Q Okay. So in convincing another person in something, that
9 you're reasoning with them correctly, that would be something
10 that would show, again, a higher level of thinking, right?

11 A That would require a higher level of thinking, I believe.

12 Q Okay. So let's play this now. Okay. This is from
13 Government Exhibit 50. It is dated March 2nd of 2006.

14 THE WITNESS: Your Honor, may I go up to hear it up
15 there?

16 THE COURT: Yes, you may. You may stand down, sir.

17 (Witness stands down.)

18 MS. COHEN: And Dr. Shapiro, while you're walking
19 down there, let me just give a little bit of background, so
20 that you can know from the get-go what this conversation is
21 about. This is about a woman who tells Mr. Wilson that she
22 found out she was pregnant and he's giving her some advice.

23 (Audio played in open court.)

24 MS. COHEN: Wait. Could we pause this for a second?
25 I think it seemed to be much louder last time.

B. Shapiro - Cross/Cohen

1 (Audio played in open court.)

2 MS. COHEN: Okay. So --

3 THE COURT: Hold on.

4 MS. COHEN: Oh, sorry.

5 (Witness retakes the stand.)

6 BY MS. COHEN:

7 Q Dr. Shapiro, fair to say this is a serious conversation,
8 correct?

9 A It's fair to say that the topic is serious.

10 Q Yes. And Mr. Wilson in this conversation is giving
11 advice to this young woman, correct?

12 A I think that he is being supportive to this young woman.

13 Q He tells her that her family can help her take care of
14 the baby, right?

15 A Correct.

16 Q He tells her to have the baby for her, for no one else,
17 correct?

18 A Correct.

19 Q He told her that this is part -- this baby is part of her
20 soul, right?

21 A Correct.

22 Q And having an abortion would be equivalent to talking
23 another human being's life, right?

24 A Correct.

25 Q So Mr. Wilson is understanding in this call, that the

B. Shapiro - Cross/Cohen

1 things that go through a decision like this as to whether or
2 not to keep a baby, right?

3 A I don't know at what level the understanding is there,
4 but I think all you need to do is watch enough TV -- at least
5 in Baltimore. I'm not sure if it's in New York or not, where
6 they have major emphasis to get moms to keep their babies and
7 they talk about pretty much the same things.

8 Q Okay. But this isn't someone saying, Mr. Wilson, what's
9 your opinion on abortion? This is him giving advice to
10 someone, correct?

11 A Correct.

12 Q So in other words, even if he has seen such a show on
13 TV -- and again, we're speculating, right?

14 A Correct.

15 Q He is applying the reasoning in the proper manner here,
16 right?

17 A He -- I don't know. He may be just repeating what he has
18 heard in this situation.

19 Q But when we're having a conversation back and forth, it's
20 almost impossible to repeat a conversation and have it make
21 sense, right?

22 A No.

23 Q Well, I mean if he had heard on a television program,
24 women should try to keep babies because it's not right to have
25 an abortion, he goes further than that in this conversation,

B. Shapiro - Cross/Cohen

1 right.

2 A You mean as far as saying she's having the baby for
3 herself?

4 Q Well, he digs down, doesn't he?

5 A (No response.)

6 Q He digs down. He calls her baby part of her soul, right?

7 A Correct.

8 Q That's recognizing that when you give human life, it's a
9 part of you, right?

10 A I think that what's happening is that you're interpreting
11 his statements based on your perspective, and I think that
12 that may be an overreach. I don't know the answer.

13 Q Okay. And you don't know because you never talked about
14 this conversation with Mr. Wilson?

15 A I did not go to the jail to talk to him about this
16 conversation. That is correct.

17 Q But certainly, you've talked to other people he knows in
18 his life, right, that has happened in this case, in order to
19 determine somebody's ability to have these adaptive
20 functioning domains, right?

21 A I would -- since my report, I've talked to a few people
22 who have known him, but my report in terms of his adaptive
23 function has been primarily based on the information gathered
24 by Mister ODr. Ollie in his report, and augmented by my review
25 of Mr. Wilson's records.

B. Shapiro - Cross/Cohen

1 Q Right. But certainly -- so you didn't interview people.
2 But certainly, an individual's interactions with someone and
3 their conversations with someone are going to affect how it is
4 you determine whether they have a deficit in adaptive
5 functioning, correct?

6 A Could you repeat the question?

7 Q Right. So let's just say this person that he had the
8 conversation with, that person -- or actually strike that.

9 People that you speak with to say, hey, how does he
10 communicate, right? And when you do adaptive functioning, you
11 ask them about conversations they might have had with the
12 person, right?

13 A Yes.

14 Q So those things are important, correct?

15 A Yes.

16 Q All right. Now, one final point on this, is that another
17 thing with interpersonal relationships is that person with
18 mild mental retardation wouldn't necessarily know when to
19 terminate a relationship or keep it going, right?

20 A Correct.

21 Q And --

22 A Rather than saying wouldn't necessarily know, because
23 that puts him in a whole lot of different what if's on that.
24 So.

25 Q Okay. What I think you use -- let's use your words,

B. Shapiro - Cross/Cohen

1 "Could not distinguish friends from acquaintances," correct?

2 A Correct.

3 Q Now, I mentioned this to you yesterday briefly, but you
4 are aware that Mr. Wilson was operating a Facebook page from
5 prison, correct?

6 A No.

7 Q Well, that's something -- so. Wait. I'm sorry. You
8 made this entire analysis and you never knew he was operating
9 a Facebook page?

10 A I didn't know he was operating a Facebook page.

11 This issue in terms of friends and acquaintances was
12 reported back when he was a child, and not at the time that he
13 was in jail.

14 Q Okay. Because you're saying --

15 A Again, so the review of the records was dealing with
16 behavior that was not necessarily current behavior, but
17 representative behavior that was there near the time of the
18 crime.

19 Q Okay. But it's important to know the entire picture of a
20 person, correct?

21 A Yes.

22 Q To get a sense of the picture of the person?

23 A Yes.

24 Q In fact, that's why you ultimately -- you went to talk to
25 Mr. Wilson because Mr. Burt told you to go there, right?

B. Shapiro - Cross/Cohen

1 A Correct.

2 Q So he made that decision in this case?

3 A Correct. He thought it would be useful for me to have
4 additional information that resulted from meeting with
5 Mr. Wilson.

6 Q Okay. Mr. Burt's not the doctor. You're the doctor,
7 right?

8 A Correct.

9 Q You also agree that it's important to talk to the person
10 now, correct?

11 A In an effort to get additional history, to get
12 explanation of things that you might have questions about in
13 reviewing the records. And the answer to that question is
14 yes.

15 Q But you didn't meet with Mr. Wilson before you formed
16 your opinion, correct?

17 A That's correct. I had enough information from reviewing
18 his previous records to say that he met criteria for adaptive
19 behavior deficits long before the crime.

20 Q Okay. When you went to meet him, you gave him problems
21 to see how he did with those, right?

22 A Right.

23 Q So that's important, as you said, to test certain things
24 in a person's intellect, right?

25 A (No response.)

B. Shapiro - Cross/Cohen

1 Q Even though it's not now, correct?

2 A Yeah.

3 Q Now, so getting back to the Facebook page, Mr. Wilson --
4 you understand how a Facebook page works, Dr. Shapiro?

5 A No.

6 Q Well, in a Facebook, a friend, somebody who sees your
7 Facebook page can reach out to you, and it's your decision
8 whether or not to accept that friend. You understand that?

9 A Yes.

10 Q Okay. So in other words, you're judging who you want to
11 speak to and who you don't want to speak to, right?

12 A Correct.

13 Q Okay. Now, in this instance -- and I don't need -- I can
14 read this email, if that's okay, just to move it along, since
15 it's just one line.

16 This woman -- and we'll hear about this a little
17 later -- but she believed -- this is back in May of 2012 --
18 that her child could be Mr. Wilson's child. And she was
19 emailing -- corresponding with him on Facebook.

20 This person, Mr. Wilson, decided he no longer wanted
21 to talk to her. And in his email, he said, he told the person
22 who was operating the Facebook account for him to block her
23 messages. So Mr. Wilson in this instance was distinguishing
24 between a person he wanted to talk to and a person he didn't
25 want to talk to, correct?

B. Shapiro - Cross/Cohen

1 A So does my four-year-old granddaughter.

2 Q But that was one of the things you put in, in terms of
3 his inability to have social interpersonal skills, right?

4 A It's a difficulty that they have. It doesn't mean that
5 people with mild intellectual limitation can't chose not to
6 socialize with somebody. It means that they have more
7 difficulty terminating relationships.

8 Q All right. Well, let's move into another category,
9 self-care. You mention in -- self-care and that involves
10 hygiene and grooming and those sorts of things, correct?

11 A Correct.

12 Q And you indicated that Mr. Wilson was delayed in personal
13 grooming, right?

14 A That was based on the reports of Monica, his girlfriend.

15 Q And Monica Cooke was Mr. Wilson's girlfriend after the
16 age of 18, correct?

17 A I don't know exact age.

18 Q She was his girlfriend much later on. I actually, I
19 believe -- I don't know the exact date, but it was certainly
20 in his -- right before the crime was committed?

21 A Correct.

22 Q Now, Mr. Wilson, though, throughout his life, didn't have
23 any trouble with hygiene. Are you aware of that?

24 A I would suggest that's not a true statement. There are
25 other reports in the file that suggest that he was, at times,

B. Shapiro - Cross/Cohen

1 not appropriately groomed. For the most, part he was, but
2 there were other times that he was not. And at those times,
3 the question always comes up, is his lack of grooming his
4 issue or his parents' issue.

5 Q Absolutely. In fact, certainly as a -- especially as a
6 very young child, there could be some issues there if you
7 don't have the right environment at home, of course, right?

8 A Correct.

9 Q And we know that in this instance, Mr. Wilson had a very
10 difficult early childhood, right?

11 A I would agree.

12 Q Especially when he was with his mother very early on,
13 right?

14 A I think for a good part of his early life, he had a very
15 difficult time.

16 Q Absolutely. He had -- his mother was taking -- using
17 crack cocaine, correct?

18 A Correct.

19 Q And then when he went to live with his aunt, there were
20 way too many people living there in a small apartment,
21 correct?

22 A It was a busy apartment, yes.

23 Q Yes, so those things might at an early age go into this
24 area, right? I mean, this could affect this area without
25 getting into -- I'm sorry. Let me restate that.

B. Shapiro - Cross/Cohen

1 His inability to have hygiene at an young age, if in
2 fact he did, could be attributed to that chaotic household,
3 correct?

4 A As we talked about before, these behaviors can result
5 from many different causes.

6 Q Okay. But there are many records in this case that
7 indicate that Mr. Wilson was adequately groomed. Do you
8 recall any of those?

9 A Yes, there was some in there.

10 Q In fact, at Brookwood, in his admission, his intake and
11 assessment form, the person wrote that, "The resident appeared
12 adequately groomed." Do you recall that?

13 A Yes.

14 Q And he was 15 years old at that time?

15 A Uh-hum (affirmative response).

16 Q Is that a yes?

17 A Yes. The question, though, is the same question that
18 would be asked earlier, which is, was there anybody else
19 responsible for saying, look sharp and get yourself together,
20 and do the things you need to do, because you're going to
21 Brookwood.

22 Q Okay. Well, let's look at times when he wasn't at
23 Brookwood. Let's talk about Dr. Frank's evaluation right
24 before he went to Brookwood. "He appeared for the evaluation
25 with adequate hygiene, wearing casual clothes." Do you recall

B. Shapiro - Cross/Cohen

1 that?

2 A Yes.

3 Q Dr. Pop actually -- Dr. Pop said -- or actually. I'm
4 sorry. This was when he got out of Brookwood and he was at
5 Far Rockaway High School. There was another -- there was
6 Dr. Pop and there was another school -- let me get the
7 psychologist. It was a record in here. She also evaluated --
8 oh, gave Mr. Wilson some testing.

9 And she said that, "Earl is a handsome young man who
10 seemingly takes pride in his appearance who wears his hair
11 tightly in neat braids to his scalp. He appears to exercise
12 excellent personal hygiene." Do you recall that?

13 A Yes.

14 Q And at that same time, Dr. Pop said that he was groomed
15 appropriately, and dressed in a manner common for students in
16 the local area. Do you remember that?

17 A Yes.

18 Q Okay. And going to -- produce these --

19 A But none of those people lived with him, and Monica did.
20 So she had the opportunity to see how he groomed himself
21 beforehand, in the real world situations and not view the end
22 product, which is what all the evaluators did.

23 Q The "end product," what do you mean by the "end product"?

24 A You're making the assumption that he was responsible for
25 the way that he looked at it, the way he presented himself.

B. Shapiro - Cross/Cohen

1 Q Okay. So in this chaotic world that he was living,
2 somebody else is neatly braiding his hair and making sure that
3 he's showered and ready to go?

4 A Someone may have said, it's time to take a shower. I
5 don't know.

6 Q Okay. Let's -- I'm going to -- I marked a few --

7 MS. COHEN: -- previously marked a few photos, Your
8 Honor. I'm going hand them up to the Court. I've provided
9 them already Bates stamped to defense counsel. Government
10 Exhibit 41, 42 and 43. (Handing.)

11 THE COURT: Are these for the Court?

12 MS. COHEN: Yes, Your Honor.

13 THE COURT: All right. Go ahead. Are you going to
14 show them to the witness?

15 MS. COHEN: Yes.

16 THE COURT: Is there any objection?

17 MR. BURT: The objection is that there has to be
18 some foundation as to when these were taken. If there is a
19 stipulation about that, that's fine. I think the Court needs
20 to know that information.

21 THE COURT: Is there a stipulation?

22 MS. COHEN: Stipulation as to when they were taken?

23 MR. BURT: Correct.

24 MS. COHEN: These were -- these were actually trial
25 exhibits in the 2006 trial, so these were --

B. Shapiro - Cross/Cohen

1 THE COURT: They're part the record already?

2 MS. COHEN: Part of --

3 THE COURT: This is the same case.

4 MR. BURT: If they're already in, I have no
5 objection. Perhaps we can consult the transcript, but I think
6 the Court ought to be informed if we know when the pictures
7 were taken, to evaluate them.

8 THE COURT: Well, why don't you provide that
9 information?

10 MS. COHEN: Sure.

11 THE COURT: Subject to providing that information,
12 they're admitted for purposes of this hearing.

13 Anything that was part of the trial record in the
14 earlier trial can be considered in this hearing, as far as
15 this Court is concerned.

16 MS. COHEN: Okay. And Your Honor, I know that these
17 were submitted as exhibits. Is it -- we'll remark them for
18 the purpose, but --

19 THE COURT: You can mark them as they're marked, but
20 then provide the Court with a representation in writing that
21 they are the same as exhibits, whatever the exhibit numbers
22 are from the prior trial.

23 MS. COHEN: Great. Okay. Thank you.

24 BY MS. COHEN:

25 Q Okay. Taking Government Exhibit -- I'm sorry.

B. Shapiro - Cross/Cohen

1 MS. COHEN: Veronica, can we just switch to Elmo?

2 THE COURT: All right. The Elmo is on?

3 MS. RAMIREZ: Yes.

4 THE COURT: Is the Elmo on.

5 MS. COHEN: Forty-two, 43, 44, I just marked.

6 THE COURT: No, 41, 42 and 43.

7 See if the Elmo is on. There's light. It should
8 be.

9 BY MS. COHEN:

10 Q Okay. So let's take a look at Government Exhibit 41.
11 And obviously, this photo, we know one thing, we know that was
12 taken prior to 2003, right, Dr. Shapiro?

13 A I'm not seeing anything.

14 MS. COHEN: Oh, is it on the Court's?

15 THE COURT: I'm sorry? What's the question?

16 MS. COHEN: It's appearing on our screens, not
17 appearing on the witness as screen.

18 THE WITNESS: It just came up now.

19 MS. COHEN: Okay.

20 THE COURT: Go ahead.

21 BY MS. COHEN:

22 Q We can agree that this picture was taken prior to 2003,
23 correct?

24 A I have no knowledge of that.

25 Q Well, Mr. Wilson -- you know that Mr. Wilson's been in

B. Shapiro - Cross/Cohen

1 prison since 2003, correct?

2 A Okay.

3 Q So that's for sure, right?

4 A Correct.

5 Q And in this picture, Mr. Wilson is right here with the
6 baseball heart on and the white jersey. Do you see that?

7 A Yes.

8 Q And you agree in that picture, Mr. Wilson looks, as you
9 can see next to the other people, he's dressed, to quote from
10 Dr. Pop, in a manner common for students in the local area,
11 right?

12 A Correct.

13 Q And he looks perfectly groomed in that picture, right?

14 A He looks appropriate.

15 Q Appropriately. I should say appropriately, right.

16 Let's look at Government Exhibit 42, and this is
17 taken at Six Flags Great Adventure. Actually that is the old
18 circle that is circling Mr. Wilson again.

19 And in this picture, Mr. Wilson took some care about
20 when he got a dressed in the day. He put a red bandana around
21 his head, right?

22 A I see a red bandana.

23 Q And he put a red bandana around his angle too, correct?

24 A I'm not sure where that's coming from, but okay.

25 Q Okay. And he's got a chain around his neck, right?

B. Shapiro - Cross/Cohen

1 A I can't see it.

2 Q Okay. He doesn't look inappropriate in light of what
3 everybody else is wearing, correct?

4 THE COURT: Is that better?

5 THE WITNESS: Much better.

6 THE COURT: Okay. Can you see the chain around his
7 neck now?

8 THE WITNESS: Yes, I can see the chain around his
9 neck.

10 THE COURT: Okay. I showed the witness the Court's
11 copy of the actual photo.

12 MS. COHEN: Thank you, Your Honor.

13 THE COURT: Go ahead.

14 BY MS. COHEN:

15 Q So he had a chain around his neck, correct?

16 A Correct.

17 Q And he has dressed pretty much like the other guys are
18 dressed, right?

19 A Correct.

20 Q All right. And now, in this last picture of Mr. Wilson,
21 again, I don't know. He looks quite young in this picture.
22 He is here -- oh, one minute. Here. And again, Mr. Wilson
23 seems appropriately groomed in this instance, as well,
24 correct?

25 A He is wearing an overcoat. I can't make a statement

B. Shapiro - Cross/Cohen

1 about that. The overcoat's a nice overcoat. It looks like
2 it's in good repair.

3 Q It looks like it's in good repair, right?

4 Okay. Now, we can go back to the -- sorry. Go back
5 to the Elmo now.

6 Now, you are aware that Mr. Wilson exercises
7 regularly, correct?

8 A Yes.

9 Q And in fact, in emails, Mr. Wilson sent other people
10 workout schedules. Are you aware of that?

11 A No.

12 Q And in those workout schedules for one was a man, and he
13 said -- he gave him the schedule. Told him to what to do and
14 he said, tell me if you can hang. Hang, if you can do it.

15 And then in another email -- we'll get to those in a
16 second -- he sent the same workout to a woman. And after the
17 bottom of it, he explains, if you can't do 50 pushups, let me
18 know and I'll lower the pushup count.

19 So in these emails, this is -- I'll just -- let's
20 talk -- just talk to it as a concept. The idea that
21 Mr. Wilson is concerned and understands workout routines is
22 something that's important to consider, right?

23 A I'm sorry. You trailed off at the end. I didn't hear
24 you.

25 Q It's something that's important to consider when looking

B. Shapiro - Cross/Cohen

1 at he hygiene, his workouts, right?

2 A These emails were sent when he was in jail, correct?

3 Q Correct.

4 A So there's not much else to do as far as working out than
5 to workout in jail, correct.

6 Q Correct. But he is also giving advice to others on the
7 workout routine?

8 A But you don't know whether he created the workout routine
9 or he copied somebody else's.

10 Q I think it's clear in this instance, he copied. That's
11 very difficult to work come up with a workout routine, right?

12 A I would think so.

13 Q But understanding that different workout routines apply
14 in different situations is something that's a little bit more
15 difficult, right?

16 A Meaning that boys and girls are different?

17 Q That somebody might not be able to handle the amount of
18 workout that another person could.

19 A So, yes, if he offered to modify it for someone he didn't
20 think would be able to do the whole workout.

21 Q That's important to consider, right?

22 A No.

23 Q It's not important to you?

24 A I don't think so. I don't think it reflects any higher
25 skills.

B. Shapiro - Cross/Cohen

1 Q Okay. Well, let's talk about you know, I think we have
2 got enough with this delay in personal grooming. Let's move
3 on. We're getting long here.

4 Let's talk about a leisure for a moment. You said
5 leisure -- in there you said that Mr. Wilson never played
6 cards, right?

7 A That was in one of the reports, correct.

8 Q Okay. And he never played games and you cited an example
9 of Monopoly, right?

10 A That was from the records, yes.

11 Q And the reason for citing is that is because games that
12 require patience or strategy might be more difficult for
13 someone with mild mental retardation, correct?

14 A Yes.

15 Q And in Monopoly, you have to strategize about what
16 properties to purchase, right?

17 A Correct.

18 Q And you have to budget money, right?

19 A Correct.

20 Q And a game that you uses strategy is a game that would
21 require a higher level of intellectual functioning, right?

22 A Correct.

23 Q You're aware -- when you formed your opinion, you didn't
24 consider the fact that Mr. Wilson played chess early on? Did
25 you consider that fact?

B. Shapiro - Cross/Cohen

1 A I didn't find that in the records.

2 Q You didn't find at Brookwood that he played chess?

3 A That's correct. I did not find that in the records.

4 Q Okay. Well let me show you -- so you didn't find it.

5 Had you found it, he clearly wouldn't have a deficit or

6 wouldn't -- it would show that your statement that he couldn't

7 play card games would be pointless, right?

8 A (No response.)

9 Q In other words, chess requires a much higher level of
10 thinking than card games do, right?

11 A Assuming the level of play, because there are all kinds
12 of chess players that you're probably aware of.

13 Q But chess is probably one of the highest-level thinking
14 games, correct?

15 A Correct.

16 Q And --

17 A To play it well, it is, yes.

18 Q If you play it well.

19 Okay. Well this is Government Exhibit -- or sorry,
20 Exhibit C-4 that is already in evidence contains many words.

21 MS. COHEN: Just show GOV 0030 -- we don't have
22 the -- do we have this in here, Veronica?

23 MS. RAMIREZ: Yes?

24 MS. COHEN: 3235?

25 MS. RAMIREZ: Yes.

B. Shapiro - Cross/Cohen

1 BY MS. COHEN:

2 Q And by the way, there are many records in Brookwood that
3 indicate the same thing. I won't go through all of them, but
4 you can see that, "The youth, Mr. Wilson, manages his free
5 time by playing chess, table games and watching TV." You see
6 that?

7 A I see that, yes.

8 Q And in fact, since you weren't aware that he did that at
9 Brookwood, you were not aware that he continued to play chess
10 regularly at the MDC? You weren't aware of that?

11 A Correct. I'm not aware of it.

12 Q Because you didn't think it was important, no one from
13 the defense actually interviewed any inmates to see how
14 Mr. Wilson was interacting with others, what he was doing in
15 prison, correct.

16 A That's correct.

17 Q All right. Now, let's talk about community resources,
18 because I know you said that was a big one where you see a
19 deficit there. And the reason you see a deficit in community
20 resources is because Mr. Wilson could not use public
21 transportation. He could not shop. He could not use an ATM,
22 and he did not know that checks required endorsements, right?

23 A Correct. Those were all in the records.

24 Q Now, basically, use of community resources, that's
25 defined as something like traveling in the community, grocery

B. Shapiro - Cross/Cohen

1 and general shopping at stores and markets, purchasing or
2 obtaining services from other community businesses, right?
3 Like gas stations or repair shops. Attending church or
4 synagog, and using public facilities like libraries, parks
5 recreational areas, streets and sidewalks, attending theaters
6 and visiting other cultural places and events, right? That's
7 the definition in the DSM?

8 A Right.

9 Q You agree that Mr. Wilson, in his background, where he
10 grew up, was not going to the theater, correct?

11 A Correct.

12 Q He wasn't buying theater tickets, correct?

13 A Correct.

14 Q Those types of things would not apply in his situation,
15 right?

16 A Correct.

17 Q And we have to look at what his situation was to
18 determine if he was using the resources that were available to
19 him, correct?

20 A (No response.)

21 Q Want me to rephrase that?

22 A Yeah. Could you.

23 Q We talked about this before. If you didn't have any
24 money, whether or not you had a bank account would be
25 irrelevant, right?

B. Shapiro - Cross/Cohen

1 A Right.

2 Q You have to look at the person, where they came and where
3 they group up, right?

4 A Correct.

5 Q It is also important --

6 MS. COHEN: Let me mark this. We have just a chart,
7 Your Honor, that that we showed defense counsel already, just
8 a demonstrative that we're going to mark as Government Exhibit
9 51, and I've an extra copy for the Court, as well. (Handing.)

10 THE COURT: This is a demonstrative exhibit?

11 MS. COHEN: Yes.

12 THE COURT: It compiles information from different
13 places?

14 MS. COHEN: Correct.

15 THE COURT: Any objection?

16 MR. BURT: No objection, Your Honor.

17 THE COURT: All right. Government Exhibit 51 is
18 received in evidence, without objection.

19 (Government's Exhibit 51 received in evidence.)

20 MS. COHEN: I can come up, since we don't have a
21 jury to block.

22 BY MS. COHEN:

23 Q So there is a time line of Mr. Wilson's life from the age
24 of ten years old in 1992, and it goes through the present.
25 The green is where Mr. Wilson was incarcerated. Okay. I

B. Shapiro - Cross/Cohen

1 mean, this is the Brookwood, but of course, I mean, that's a
2 jail for juveniles.

3 A (Nods head affirmatively.)

4 Q And again, here so he was 19 -- January of 1998, to
5 November 1999, then he went back in at Rikers in April 2000,
6 got out in March 2001. A short time in September of 2002 to
7 November of 2002, then of course in 2003.

8 So while it is difficult sometimes to look at a
9 person what they're doing in prison for the reasons you
10 explained, when we have such limited time here, we also have
11 to consider that much of Mr. Wilson's life has been in prison,
12 correct?

13 A Correct.

14 Q And in fact, when we even judge getting out of Brookwood
15 in this small period of time, that would be when Mr. Wilson
16 was living with his cousin, Vanessa, that would be a time when
17 Mr. Wilson didn't ever any money, right? I mean, he just got
18 out juvenile prison?

19 A (Nods head affirmatively.)

20 Q He was institutionalized for a year, right?

21 A (Nods head affirmatively.)

22 Q You have to --

23 A Yes.

24 Q -- do and answer.

25 A I'm sorry.

B. Shapiro - Cross/Cohen

1 Q So those things are a little bit more difficult, things
2 like community resources. Even some of the -- the hygiene,
3 but even some of the self-care, right, because somebody who's
4 going in and out of prison might have difficulty getting
5 themselves back on their feet, even someone without mild
6 mental retardation, right?

7 A So the question is when people who have mild mental
8 retardation have difficulty integrating into the greater
9 society after discharge from an institution?

10 Q No. My question is anybody who is institutionalized and
11 gets out of an institution, there are things that are more
12 difficult to do, right? Because you've got to get back on
13 your feet, right?

14 A Correct.

15 Q Okay. Now, so while you say that Mr. Wilson could not
16 use an ATM, he certainly can use a computer, right?

17 A At the current time, yes.

18 Q And he avails himself of Facebook, despite the fact that
19 he can't actually get on Facebook, right?

20 A At the present time, yes.

21 Q Now, you also talk about shopping, right?

22 A Yes.

23 Q You don't -- you said that he could not shop?

24 A Correct.

25 Q Correct. Now, again, we only have a limited time here to

B. Shapiro - Cross/Cohen

1 look at when Mr. Wilson would actually do shopping, right?

2 A Well, this was at the time before he was 15.

3 Q I mean, what instance are you referring to specifically?

4 A I think it was his aunt saying that she couldn't trust
5 him to go to the store to buy things.

6 It was another incident that was talked about. I'm
7 sorry. I don't remember the age of it. But they said if they
8 sent him to the store to buy Wonder Bread and they didn't have
9 Wonder Bread at the store, that he didn't know what to do and
10 came back with nothing.

11 Q Right. That was Monica Cooke, right?

12 A Right.

13 Q That was when he was much older, correct?

14 A Yeah.

15 Q Are you aware that at some point while he was at MDC, I
16 don't exactly know when, Mr. Wilson had maybe he still has
17 Dolce examine Gobana sunglasses? Are you wear of that?

18 A I'm sorry. I didn't hear.

19 Q Dolce and Gobana? It's a designer. Do you know?

20 A No knowledge.

21 Q I guess you don't have any daughters. It's a very
22 expensive designer.

23 In -- let's look at Government Exhibit 5913 --
24 sorry, Bates number 5913 --

25 MS. COHEN: -- which is now being marked as

B. Shapiro - Cross/Cohen

1 Government Exhibit 15. (Hanging.) This is another email.

2 THE COURT: Thank you.

3 Any objection to 15?

4 MR. BURT: No, Your Honor.

5 THE COURT: Government Exhibit 15 is received in
6 evidence, without objection.

7 (Government's Exhibit 15 received in evidence.)

8 BY MS. COHEN:

9 Q Okay. Let's look at the top email here. This was an
10 email from Mr. Wilson to his sister, DePetra, and he says,
11 "Here is something for you to give to mommy for my glasses, so
12 it won't cost that much. (Denny Optical.com)"

13 So in this instance, Mr. Wilson is recognizing that
14 there are places to shop for things that cost more money and
15 get bargains at them, right?

16 A I can't make that conclusion based on what you had
17 provided me.

18 Q Okay. But he's giving his sister a place to go to get
19 his glasses, right?

20 A Correct.

21 Q Okay. Now, in another instance, going -- this is Bates
22 number --

23 A But the key question is, would he have been able to go to
24 this place himself, pay for the glasses and realize that he
25 got the right amount of money back and be able to choose from

B. Shapiro - Cross/Cohen

1 a variety of different frames to decide on which one he liked
2 best and which was the best buy. That's probably more what I
3 mean when I'm talking about shopping.

4 Q Right.

5 A Rather than just saying, I have a need. Meet my need.

6 Q And it's difficult for us to really know this, right?
7 Because -- I'm sorry. Withdrawn.

8 It's difficult to know this for sure what Mr.
9 Wilson's capabilities were in shopping because we have a
10 limited time in his life where we can look at that, right?

11 A But his shopping abilities were not even those of
12 somebody -- even at a younger age were not those of somebody
13 who was of similar age.

14 Q But in Mr. Wilson's background, we also have to consider
15 the fact that he didn't have any money growing up, right?

16 A He did not have any money growing up, I assume. Correct.

17 Q Right. He wasn't going out, buying himself a bunch of
18 clothes whenever he wanted. He didn't have the resources,
19 correct?

20 A Correct.

21 Q So we're really relying on Monica Cooke's statement,
22 right?

23 A Primarily.

24 Q And his Aunt Lou, who said something about she couldn't
25 trust him with shopping, right? Of course, we don't know what

B. Shapiro - Cross/Cohen

1 trust means, right?

2 A (Nods head affirmatively.)

3 Q We don't know what she meant by --

4 A You don't know the context in which the statement was
5 made, correct.

6 MS. COHEN: Okay. So Government Exhibit 16 --

7 THE COURT: All right. Any objection to 16?

8 MR. BURT: No, Your Honor.

9 THE COURT: Government Exhibit 16 is received in
10 evidence, without objection.

11 (Government's Exhibit 16 received in evidence.)

12 BY MS. COHEN:

13 Q In this email, Dr. Shapiro, Mr. Wilson tells his sister
14 to go to -- you can see at the bottom -- to this best -- he
15 spells it wrong -- Best College Deals.com, to get help with
16 Daphne and her pick of college.

17 Now, Mr. Wilson has a niece, Daphne, DePetra's
18 daughter. I'm not sure if you're you aware of that,
19 Dr. Shapiro?

20 A (No response.)

21 Q Dr. Shapiro?

22 A I'm sorry. I was reading it.

23 Q Oh, I'm sorry. I just put this into the context. This
24 is Mr. Wilson corresponding with his sister about Mr. Wilson's
25 niece, Daphne.

B. Shapiro - Cross/Cohen

1 So the fact that Mr. Wilson is sort of touching
2 here -- I mean, again, we have limited time, but he's thinking
3 about of a place for her to go and look for colleges, so that
4 she can get the best deal on a college, right?

5 A (Peruses document.) I can't make that conclusion. Again,
6 you are putting your perspective on it because of the website.
7 It may just as well have been this is a place to look for
8 colleges, period.

9 Q Okay. Well, actually, we don't really have to guess
10 here, because DePetra emails back and asked him, "Hey, you
11 mean best college deals? Where did you hear of this website?
12 I will forward the information to her."

13 So, in other words, she obviously went on or thinks
14 that she's going to provide this information to her daughter,
15 so that he can be helping her in selecting colleges, right?

16 A Correct.

17 Q Okay. Let's move onto -- let's just touch on home
18 living, working -- health, safety, health and safety. Okay.
19 Home living is a very difficult area to the look at Mr. Wilson
20 in, right, because of his lack of living in a home, correct?

21 A Correct.

22 Q I mean, we have for really from age ten to 15, I mean,
23 well, you know, a young age, but we were talking about a
24 making a home and being able to do the things that require
25 home living, you've got to be a little bit older, right?

B. Shapiro - Cross/Cohen

1 A Well, the information was primarily collected from when
2 he was a child.

3 Q Right. But there's certain time when even a child cannot
4 cook by themselves, right?

5 A Correct.

6 Q And they can't use the stove, right?

7 A Right.

8 Q At least you wouldn't want them to?

9 A If you're saying at three or four, we could make note of
10 it.

11 Q Okay. But here, you mention that Mr. Wilson learned to
12 make a bed at a later age. Do you remember that? Or you said
13 that in your report? I'm sorry.

14 A Yes.

15 Q And you would you agree that making a bed might be not
16 the first thing that was happening in these places where
17 Mr. Wilson was living, right?

18 A I think that was with Ms. Cooke at the time who made that
19 statement.

20 Q Okay. And Ms. Cooke was much later in his life before he
21 went into prison, right?

22 A Yes.

23 Q And we know that Mr. Wilson now keeps his cell
24 immaculate, correct? He is the cleanest on the unit, right?

25 A Yes.

B. Shapiro - Cross/Cohen

1 Q So he could not maintain a home, is another indicator you
2 said you put down, right?

3 A Correct.

4 Q But again, we have to look at the fact that Mr. Wilson
5 didn't have much time in his life to really make a home,
6 correct?

7 A Correct.

8 Q So let's go to work for a moment, and you also -- citing
9 the fact that Wilson -- Mr. Wilson could not fill out a job
10 application by himself, that his longest work experience was
11 three days, right?

12 A Correct.

13 Q And that he had no consistent work history, right?

14 A His total work experience was one day and three days.

15 Q Right.

16 A That's not a consistent work experience.

17 Q So it's very difficult, again, to evaluate Mr. Wilson in
18 this context, because let's face it, he went into a juvenile
19 facility at age 15, and wasn't very much time for him to work,
20 correct?

21 A Well, he did so poorly at one of the jobs, that after one
22 day, they asked him not to come back. The other one is after
23 three days, they did not ask him to come back.

24 So he did not possess the work skills necessary to
25 be successful. It may not just be to work schedule -- use

B. Shapiro - Cross/Cohen

1 that in the broad sense of work skills, to be able to be
2 successful at the positions.

3 Q And that information came from Monica Cooke, is that
4 right?

5 A No, there were a couple of other areas where they spoke
6 to his total Social Security earnings being \$338, and I made
7 note of the fact that his longest work experience was three
8 days.

9 Q Okay. And no one went to speak with any of these people
10 that Mr. Wilson worked with, right?

11 A Correct.

12 Q Now, Mr. Wilson --

13 A The other part of that, though, in terms of work is that
14 he could not fill out a job application. So not only did he
15 lack the work -- the skills necessary to be successful at
16 work, he also lacked the skills that were necessary to -- as
17 preliminary to working.

18 And there were a couple of reports. I think one was
19 with his sister the other again was with Ms. Cooke. In one
20 area, where he was in prevocational program, and when they
21 realized that he couldn't fill to the job application, they
22 put him into a program to teach him how to fill out job
23 applications.

24 Q You're actually talking about when he got out of
25 Brookwood with Vanessa Linley, correct?

B. Shapiro - Cross/Cohen

1 A Correct.

2 Q Someone who has a severe learning disability would also
3 have trouble filling out a job application, correct?

4 A Potentially.

5 Q Potentially?

6 A We've already stipulated that's the case.

7 Q Right. Now, someone who has been in -- for the first
8 time the filling out a job application is a little bit more
9 difficult, correct?

10 A Correct.

11 Q Especially when they've been incarcerated?

12 A I think this first job application was filled out before
13 he was incarcerated.

14 Q With Vanessa Linley, that job application was filled out
15 when he got out of Brookwood?

16 A Okay. You're calling Brookwood incarceration?

17 Q Have you seen Brookwood?

18 A No.

19 Q Well, there's barbed wire in Brookwood.

20 A Okay.

21 Q You're not allowed to leave Brookwood. Are you aware of
22 that?

23 A Yes.

24 Q So we don't really know, again, if Mr. Wilson's lack of
25 work was effort or he could not literally do the job, right?

B. Shapiro - Cross/Cohen

1 A He lacked the work skills to be able to be successful at
2 the work.

3 Q Were you aware of specific skills he lacked?

4 A No.

5 Q Now, he did, though, work in a non -- he did illegal
6 work, correct?

7 A He did illegal activity. I'm not sure of his employment.

8 Q I mean, selling drugs would be illegal work, correct?

9 A Selling drugs would be an illegal activity. I'm not sure
10 I would call it work.

11 Q You can make money from drugs, right?

12 A Correct.

13 Q In fact, some people, that's their entire -- that's how
14 they make money, right?

15 A Correct.

16 Q Okay. Now, okay let's go onto --

17 THE COURT: About how much longer do you have with
18 this witness?

19 MS. COHEN: Oh, sorry, Your Honor. I only have --
20 and I went a little bit longer than I thought. I have one,
21 two quick categories -- three quick categories to just touch
22 on, one phone call, and I'm done.

23 THE COURT: In terms of days, hours --

24 MS. COHEN: Time?

25 THE COURT: -- weeks? I'd like something time-wise?

B. Shapiro - Cross/Cohen

1 MS. COHEN: Sorry.

2 THE COURT: Not category-wise.

3 MS. COHEN: About 15 minutes.

4 THE COURT: All right. We should take a lunch
5 break. We'll take an hour for lunch.

6 MS. COHEN: Okay. Thank you, Your Honor.

7 THE COURT: All right.

8 THE WITNESS: Thank you, Your Honor.

9 THE COURT: Thank you.

10 (Lunch recess.)

11 (Continued on the next page.)

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B. Shapiro - Cross/Cohen

1 (The Honorable Nicholas G. Garaufis takes the bench
2 at 2:10 p.m.)

3 THE COURT: Please be seated.

4 (Defendant present in open court.)

5 THE COURT: We'll continue with the
6 cross-examination of the witness. The witness is reminded
7 that he is still under oath.

8 Ms. Cohen, you may continue.

9 CONTINUED CROSS-EXAMINATION

10 BY MS. COHEN

11 Q Dr. Shapiro, just prior to when we broke, I was looking
12 at many E-mails. And I just want to show you one last E-mail.
13 This is Bates-numbered 91 -- excuse me. This is
14 Bates-numbered 6132, and it's been marked and admitted as
15 Government Exhibit 37. (Handing.)

16 THE COURT: Exhibit 37. Any objection?

17 MR. BURT: No, your Honor.

18 THE COURT: Government Exhibit 37 received in
19 evidence without objection.

20 (Government's Exhibit 37 received in evidence.)

21 BY MS. COHEN

22 Q And, Dr. Shapiro, you're aware that Mr. Wilson has been
23 working on publishing a book, correct?

24 A He told me that he wanted to become a book publisher.

25 Q He told you when you met with him?

B. Shapiro - Cross/Cohen

1 A Correct.

2 Q And you're aware that -- by the way, when we were talking
3 about the literacy, I just want to make sure that we're
4 specific here.

5 You said in your report that Mr. Wilson is
6 illiterate, right?

7 A Yes.

8 Q But there's a difference between being illiterate and
9 what you were describing as functionally illiterate; is that
10 correct?

11 A There are -- just as there are degrees of adaptive
12 behavior, there are degrees of literacy, yes. So there is
13 literacy that will enable you to read the Daily News and not
14 the New York Times. And there is literacy that would then
15 deal with things like reading and understanding a lease.

16 Q But the term "being illiterate" is someone who cannot
17 read, correct?

18 A No.

19 Q So there is --

20 A I defined it as somebody who could not read for
21 information.

22 Q Isn't there also a term "functionally illiterate"?

23 A Yeah. But it's not a meaningful term.

24 Q So you put everybody under the term of "illiterate"; is
25 that right?

B. Shapiro - Cross/Cohen

1 A Right.

2 Q Now, in this E-mail -- let's focus here -- in this E-mail
3 Mr. Wilson is talking with a woman who's handling the
4 publishing of his book for him. And he writes, "It's a lot
5 that need to be done, like copyright the books and agreements
6 as far as the percent of income going to them and to us, the
7 publisher, then you and me. You know the legal stuff, as you
8 said. That's about four ways. So let me make it rough draft
9 of everything."

10 In this E-mail Mr. Wilson is talking about the
11 logistics about how the book is going to be published, right?

12 A He's talking not about how the book is going to be
13 published but how, after the book is accepted, that they might
14 decide and enter into a legal agreement with the publisher to
15 be able to decide how to ensure that he has copyright, because
16 he's probably heard that's important to do, and how to split
17 the money from -- the proceeds from the book.

18 Q Right.

19 And publishing a book, that takes quite a bit of
20 initiative, right?

21 A There are many manuscripts that are submitted and not
22 many that are accepted, so the answer to your question is
23 probably yes.

24 Q It takes creativity, correct?

25 A Creativity to submit a manuscript?

B. Shapiro - Cross/Cohen

1 Q To write a book.

2 A Yes.

3 Q And in this instance, Mr. Wilson is talking about, as I
4 said, the logistics, which involves a certain sense of
5 planning, correct?

6 A I'm sorry. I didn't hear the question.

7 Q It involves a certain sense of planning, right?

8 A What's the word? Sent?

9 Q Sense of planning.

10 A Sense of planning.

11 It requires to set up a goal. I'm not sure how much
12 planning is evidenced in this E-mail.

13 Q But the concept of writing a book and getting it
14 published requires a person to think into the future, right?

15 A Yes.

16 Q All right.

17 And by the way, a lot of these people in which you
18 obtain the adaptive-functioning information from -- withdrawn.

19 You obtained the adaptive functioning from the
20 experts' reports, correct?

21 A And reviewing the records that were recorded in
22 real-time.

23 Q Right.

24 And the people who provided the experts with the
25 information were Mr. Wilson's family members, right, and

B. Shapiro - Cross/Cohen

1 his -- were his family members and former girlfriend, right?

2 A His very extended family, yes.

3 Q And, in fact, you talked a lot about Monica Cook, right?

4 A Yes.

5 Q And Monica Cook -- I just double-checked the records
6 during the break -- was actually his girlfriend of 19 -- when
7 he was 19, he began dating her?

8 A Okay. Yes.

9 Q Now, Ms. Cook and the other family members obviously have
10 an interest or have a bias here, correct?

11 A Most of the information that I got from Monica -- let me
12 retract that. Potentially.

13 Q Right.

14 I mean, the people that you spoke to care about
15 Mr. Wilson, right?

16 A Yes.

17 Q And they understand the stakes that are present here,
18 correct?

19 A I don't know. I assume so.

20 Q Okay.

21 Now, I just want to play one last phone call. So
22 before we play it, I'm just going to give you a little
23 background, because I know it's hard to hear. In this
24 conversation, Mr. Wilson is talking to the woman who I
25 mentioned before who believed that her son might be

B. Shapiro - Cross/Cohen

1 Mr. Wilson's son.

2 So with that, I'd like to play this one last phone
3 call, ask you a few questions.

4 THE COURT: All right. What is -- that's on
5 Disk 50?

6 MS. COHEN: Fifty.

7 THE COURT: Government Exhibit 50? And the date of
8 the phone call is --

9 MS. COHEN: May 7th, 2012, your Honor. And,
10 actually, there are two phone calls. They go right after
11 another in quick succession.

12 THE COURT: So there are two phone calls, one after
13 the other.

14 Doctor, would you like to step down and listen?

15 THE WITNESS: I would. Thank you so much.

16 THE COURT: Please do.

17 (An audio recording was played.)

18 MS. COHEN: This follows immediately after. It's
19 very quick.

20 (An audio recording was played.)

21 MS. COHEN: You can stop -- oh, no, sorry. Keep
22 going.

23 (Audio recording resumed.)

24 THE COURT: Is that it?

25 MS. COHEN: Yes.

B. Shapiro - Cross/Cohen

1 BY MS. COHEN

2 Q Dr. Shapiro, that was a lengthy conversation, right?

3 A It was a lot to process on the first time, yes.

4 Q Right.

5 During that conversation -- and the reason I'm
6 playing this now is because we've been talking about all of
7 these adaptive-functioning aspects, right? Or domains.
8 Sorry.

9 A You've been talking about it; and I've been responding,
10 yes.

11 Q Right.

12 And we talked about reasoning, right, today?

13 A Yes.

14 Q And reasoning -- in this conversation, we saw a lot of
15 reason, right? Reasoning. Let me withdraw that.

16 When Mr. Wilson is telling this person to go take a
17 test, he reasons with her, right?

18 A I think he orders her. I'm not sure there's that much
19 reasoning that went on. If you listen to the tape, the
20 efficiency of the communication is not very good. There are a
21 lot of words being used and not much communication being
22 spoken.

23 Basically, he's asking her to take the test -- I
24 understand he's asking her to take the test in order to ensure
25 that this child -- I have no idea how old this child is -- is

B. Shapiro - Cross/Cohen

1 his and not somebody else's.

2 Q Right.

3 A Which is the typical plot on everyday TV as far as Maury
4 Povich or Montell Williams. I forget which one of those two
5 gentlemen runs a daytime show that just specializes in folks'
6 getting paternity tests.

7 And, in fact, he did not know the name of the test.

8 Q Okay.

9 Well, let's not talk about the subject. I mean,
10 whether or not to get a test or not to get a test is pretty
11 simple, as you said.

12 But the way in which Mr. Wilson tries to convince
13 this woman goes like this: He tells her take the test, right?
14 And then he backs off at a certain point, correct?

15 A He seemed to back off, and then he came back at her
16 again. And finally they disconnected as far as the first
17 phone call; and then he began talking to somebody else, who is
18 not privy to the first conversation, and restated the same
19 stance as well.

20 I thought it interesting in the second call that he
21 was talking about taking custody of the child, if it was his,
22 while he was in jail; and that raised the question in terms of
23 how well that represents forward thinking and self-direction.

24 Q Well, he was asking his sister, in fact, to take custody,
25 correct?

B. Shapiro - Cross/Cohen

1 A No. He said, "I'll take custody," is what I thought I
2 heard him say.

3 Q We can go back. He actually asks his sister to take
4 custody. And she says, "Well, he's 9 years old. Why would he
5 want to go with me?"

6 A I didn't hear that part.

7 Q Do you want me to replay it?

8 A Sure.

9 THE WITNESS: Your Honor, is it okay?

10 THE COURT: Yes, you may.

11 (Witness moves closer to the recording.)

12 (Audio recording played.)

13 BY MS. COHEN

14 Q Okay.

15 So, Dr. Shapiro, you can hear that he's asking his
16 sister to take custody of this child, right?

17 A If that's who he's talking to, yes.

18 Q Right. The woman he's talking to, right.

19 And he talks about this boy -- "Don't play with this
20 boy's mind," right?

21 A Yes.

22 Q And he's concerned about this boy's future, correct?

23 A Yes.

24 Q And he's telling her -- while he does tell her "Get this
25 test," at some point he backs off, right?

B. Shapiro - Cross/Cohen

1 A Yes.

2 Q And he says -- he gives her, really, a choice: "Look,
3 you don't want to get the test. That's up to you. But then
4 don't come back, trying to say that this is my son. Let's
5 stop talking about it, then." Right?

6 A That's what he said, yes.

7 Q And he makes a judgment about her, correct, about her
8 mental state?

9 A Yes.

10 Q Yes.

11 In fact, he says that she has mental problems,
12 right?

13 A Yes.

14 Q And he also uses some problem solving here, right? I
15 mean he says -- as I said, he gives her this choice: "Either
16 take the test or move on and stop talking about it." Right?

17 A Yes.

18 Q And he certainly is not being -- not showing that he's a
19 follower in this conversation, right?

20 A In this particular conversation?

21 Q Right.

22 A Yes.

23 Q He's not showing that he's gullible, correct?

24 A He's not showing that he's --

25 Q That he's gullible.

B. Shapiro - Cross/Cohen

1 A I think that he is advocating from a point of view in
2 this conversation. I wouldn't say anything about gullibility
3 or not gullibility based on the conversation.

4 Q Well, someone who's gullible might more likely be willing
5 to believe that a child could be theirs, instead of going and
6 getting the proof, right?

7 A The problem I'm having with the question is you can be
8 gullible and still -- in certain circumstances and not
9 gullible in other circumstances. So it isn't something that's
10 pervasive in all behaviors and all times. And that's what I'm
11 having difficulty with in terms of answering your question
12 directly.

13 Q Okay.

14 But just in general, somebody who's gullible is more
15 likely to believe something versus somebody that is not
16 gullible?

17 A That is correct.

18 Q And all of these things -- just to close the loop here,
19 going back to your original slide when you talked about a
20 general mental ability includes reasoning, planning, solving
21 problems, thinking abstractly, comprehending complex ideas,
22 learning quickly and learning from experience -- that was in
23 your slide, right?

24 A Yes.

25 MS. COHEN: Thank you, Your Honor.

B. Shapiro - Cross/Cohen

1 And thank you, Dr. Shapiro.

2 I have no further questions.

3 THE COURT: Redirect?

4 REDIRECT EXAMINATION

5 BY MR. BURT

6 Q Dr. Shapiro, was there anything in that nine -- almost
7 nine hours of cross-examination that changed your opinion
8 regarding whether Mr. Wilson is intellectually disabled?

9 A No.

10 Q Do you still believe he has a significant deficit or
11 limitation in intellectual functioning?

12 A I do.

13 Q Do you still believe he has a significant deficit in
14 adaptive behavior, as it's defined within the DSM and the --
15 the green book?

16 A And relative to the time of the crime, yes.

17 Q And do you still believe that his developmental
18 disability originated before 18?

19 A Yes, I do.

20 Q Now, you were asked about a number things in that nine
21 hours. And, of course, I'm not going to have time to go
22 through all of them; but I just want to hit a few of the
23 highlights.

24 She started with an implication that there was some
25 impropriety in you considering the opinions of other experts.

B. Shapiro - Redirect/Burt

1 How do you diagnose people with intellectual disabilities in
2 your practice?

3 A In my practice I will draw upon history, usually from
4 parents and their other caretakers and available records from
5 school, previously evaluations, other people who have
6 evaluated the child and have knowledge of the child or young
7 person's behavior.

8 Q And what is the role of other experts in that process?

9 A Well, the other experts administer -- may administer
10 instruments that are used before coming to a conclusion
11 regarding the person's function.

12 Q And do you operate as a multidisciplinary team in your
13 hospital when you diagnose intellectual disability?

14 A Yes.

15 Q So who typically is part of that team, and what input do
16 they give you in reaching a diagnostic opinion?

17 A So, I may frequently work with a psychologist. I also
18 frequently work with a speech-and-language pathologist; less
19 frequently work with an educator; depending on the child's
20 other needs, maybe working with an occupational or physical
21 therapy.

22 Q All right.

23 And in this case, a forensic case, you worked with a
24 number of different professionals to reach your opinion?

25 A Correct.

B. Shapiro - Redirect/Burt

1 Q Including a neuropsychologist, Dr. James?

2 A Yes.

3 Q Including a psychologist, Dr. Olley, who specializes in
4 assessing adaptive behavior?

5 A Yes.

6 Q Including a neuropsychiatrist, Dr. George Woods, who
7 specializes in neuropsychiatric issues?

8 A Yes.

9 Q Is there anything unusual about that approach; that is, a
10 multidisciplinary approach involving a neuropsychologist,
11 adaptive-behavior expert, a neuropsychiatrist?

12 A I don't think -- I don't think it's unusual. I think
13 we -- we share information, but come to our independent
14 conclusions.

15 Q In fact, the green book that's in evidence at page 85
16 says, does it not, "Members of a variety of professions --
17 such as psychologists, physicians, diagnosticians, expert
18 educators, special education teachers, and social workers --
19 are frequently involved in the diagnosis, classification, and
20 provision of individualized supports s to persons with
21 intellectual disability."

22 Eighty-five.

23 A Yes.

24 Q And it says, "These individuals are members of their
25 primary provision and may also be members of the unique

B. Shapiro - Redirect/Burt

1 interdisciplinary group of ID professionals," end quote.

2 A Yes.

3 Q So is there anything at all unusual about you relying on
4 other experts in the context of diagnosing intellectual
5 disability in this case?

6 A I think it's the preferred method because this is a
7 complicated case in a sense that early on not only were
8 cognitive and adaptive-behavior issues but there were also
9 issues relating to mental health that were at least comorbid
10 in the presentation of this child. So I felt that would
11 probably make the most sense to have an interdisciplinary team
12 with this child.

13 Q Now, have you some slides on comorbid diagnosis. And I
14 don't think we covered it on direct examination. But some
15 issues were raised about that, correct, in relation to
16 Dr. Drob's diagnosis a learning disability?

17 A Yes.

18 Q Do you recall that?

19 A Yes.

20 Q And if we could, let me draw your attention to one of
21 your slides that we didn't talk about. And this is about
22 Slide 97. This is Slide 97, right?

23 A Yes.

24 Q What does this reference in terms of the issue that was
25 raised on cross-examination about, well, didn't Dr. Drob

B. Shapiro - Redirect/Burt

1 diagnosis him with a learning disability?

2 A I think the importance of this is that you can have
3 intellectual disability and a learning disability at the same
4 time. Similarly, you can have attention deficit/hyperactivity
5 disorder at the same time. You can have major depression
6 order at the same time. You can have anxiety disorder at the
7 same time. You can have -- you can have almost anything else
8 as a coexisting diagnosis.

9 The -- both the DSM and the AAIDD say that if you
10 meet criteria for intellectual disability, you -- that
11 diagnosis should be made.

12 Q Right.

13 And it goes to an issue the judge raised the other
14 day, which is what is the difference between mental illness
15 and intellectual disability. Do you recall that question?

16 A Yes, I do.

17 Q So is your answer that an individual can have both, a
18 mental illness and an intellectual disability --

19 A Yes.

20 Q -- or no?

21 A Yes.

22 Q And in that situation, where you see -- and can certain
23 mental illnesses have the same symptoms as intellectual
24 disability?

25 A You may see behavioral disturbance arising primarily from

B. Shapiro - Redirect/Burt

1 the intellectual disability, yes.

2 Q Okay. And how about learning disability? For instance,
3 do learning disability and intellectual -- do learning
4 disability and intellectual disability share common symptoms?

5 A Well, some of them are. So, for example, learning
6 disability and intellectual disability typically will both
7 show academic underachievement.

8 Q And how do you distinguish the two? Say you've got
9 somebody who is academically underachieving -- underachieving.
10 How do you tell whether the person has an intellectual
11 disability, a learning disability, or has both?

12 A The way that it is most common -- traditionally has been
13 most commonly used is looking at a severe discrepancy, which
14 is looking at a discrepancy between the person's potential and
15 their achievement. That is to say, their potential for
16 learning typically is measured by IQ and their actual
17 achievement.

18 And it is possible to have a situation exist where
19 someone with intellectual disability doesn't achieve to the
20 level predicted by their IQ alone, in which I case then they
21 may have both conditions coexisting.

22 Q And give me an example of where that would take place, in
23 terms of an example where someone would have a certain level
24 of IQ, would not be performing up?

25 A Right.

B. Shapiro - Redirect/Burt

1 So let us say we have somebody who has a full-scale
2 IQ after all the -- assuming it's done in the most pristine
3 fashion -- of 69 --

4 Q Okay.

5 A -- and at age 15, they are only reading at about a mid
6 first-grade level. That would be a situation where somebody
7 had a substantial discrepancy between the cognitive potential,
8 as predicted by the IQ, and their reading ability.

9 Q And how about in this case? Given the IQ numbers and the
10 evidence of academic deficits, is this a situation where both
11 the reading disability and intellectual disability are
12 properly diagnosed?

13 A The reason why I'm hesitating is because while it's
14 probably true that that would be the case, I'd be more
15 inclined to class him as a person with intellectual disability
16 who has a superimposed language disorder because his language
17 is much lower functioning.

18 Q Much lower functioning than you would expect given his --

19 A For his IQ.

20 Q Okay.

21 And does the fact --

22 MS. COHEN: Objection, your Honor, to the diagnosis
23 of the superimposed learning disability. It's not in this
24 witness' report. And we weren't noticed that this was indeed
25 another diagnosis.

B. Shapiro - Redirect/Burt

1 THE COURT: Is that a subject of your report? Is
2 that covered by your report?

3 MR. BURT: I don't think it's in his report; but
4 it's responsive to the point made by Drob, which is Drob
5 diagnosed him with a learning disability and, therefore, he
6 don't diagnosis him with mental retardation.

7 So what I'm asking this witness is, is that correct
8 and if it's not correct, you know, how should he be
9 classified. But I think it's fair game given the cross,
10 whether it's in his report or not. I think that point may go
11 to the weight of his opinion, but it doesn't rebut the point
12 that was -- it doesn't negate the right to address what was
13 raised in cross.

14 MS. COHEN: Your Honor, Dr. Shapiro had all of
15 these records. He's relying on Dr. Drob's score. Nowhere in
16 his report does he diagnosis him with intellectual disability
17 and a superimposed learning disability. He doesn't mention
18 it. He doesn't explain away Dr. Drob's diagnosis.

19 And now, in response to what was brought out, he's
20 making another diagnosis. So I'm objecting because it wasn't
21 in the report and it's now an opinion that's coming out later
22 that we didn't have notice of. We in this case prepared for
23 one response. It's just to counter the diagnosis of mental
24 retardation.

25 THE COURT: Are we opening up a new avenue here

B. Shapiro - Redirect/Burt

1 that's going to result in requiring additional expert
2 testimony later on? Because if we are, then I'd have some
3 real concerns about it.

4 MR. BURT: I don't think we are, your Honor. He
5 does discuss at length, page 14 through 17, under a heading
6 "Comorbidity," which is what we're talking about; in other
7 words, is there more than one disorder that can be diagnosed
8 here. And that's all we're really addressing: Is it just ID?
9 Is it learning disability and ID? And if so, you know, what
10 is the reason for that?

11 MS. COHEN: Again, Dr. Shapiro had all the
12 information, didn't indicate a diagnosis of this in his
13 report; and in addition, he's relying on this part now of the
14 DSM when there's another part of the DSM that specifically
15 talks about a diagnosis of mental retardation and learning
16 disability and when, in what circumstance, that possibly could
17 exist. And that's a very, very, very rare circumstance. So
18 that would go into a whole other can of worms here.

19 THE COURT: I hear you.

20 Are you going to argue that, assuming the doctor
21 were to make a response indicating a learning disability, that
22 the defendant -- if it were not enough to base a decision
23 granting your motion on an intellectual disability, that a
24 combination of learning and intellectual disability would be
25 sufficient to result in granting your motion?

B. Shapiro - Redirect/Burt

1 MR. BURT: No, we're not going to make that
2 argument.

3 THE COURT: Then, why is it the subject of your
4 redirect?

5 MR. BURT: Because an important point that was being
6 sought to be made on cross was that since Dr. Drob diagnosed
7 him only with a learning disability in a situation where he
8 had an incentive to diagnosis him with mental retardation,
9 therefore, Mr. Wilson does not have an intellectual
10 disability.

11 And I'm trying to address that issue by showing that
12 just because he has a learning disability does not rule out
13 intellectual disability. And that's really the whole point.
14 It's just responsive to the cross.

15 So we're not doing this for the purpose of laying
16 the groundwork for some argument that a learning disability
17 alone or in combination with something else should lead to
18 barring the death penalty. It's simply to respond.

19 THE COURT: I hear you.

20 All right. If the question is posed to the witness
21 as to whether the fact that there's been a finding of a
22 learning disability does or does not rule out intellectual
23 disability, would that be a problem for you?

24 MS. COHEN: Well, with this particular witness, yes,
25 because he doesn't address this in the report. He makes a

B. Shapiro - Redirect/Burt

1 diagnosis of mental retardation, doesn't address the fact of a
2 learning disability. Just says he's got mental retardation.

3 And because we bring out on cross the fact that
4 someone else said this when they were trying to find mental
5 retardation, that he should now be allowed to come back and
6 say, "Oh, hey, you know what. He's got both of them, and
7 that's the explanation" -- if they want to delve into that
8 with -- and call Dr. Drob, I don't know -- I don't think it
9 was in any of the reports, but that would be a different
10 issue.

11 THE COURT: Well, the question --

12 MR. BURT: He did raise that in his report, though,
13 because he says in page 2, "Mr. Wilson presents a complex
14 picture because from early childhood, his neurodevelopmental
15 dysfunction was diagnostically overshadowed by severe behavior
16 disturbance. Comorbid conditions are not exclusions for
17 mental retardation, intellectual disability. The diagnosis of
18 mental retardation does not require identifying the cause of
19 the disability. In most cases, no specific causative factor
20 can be identified."

21 So he is addressing the very issue that I'm trying
22 to explore here. There's no lack of notice as to this area.
23 They've been provided with it in the report.

24 THE COURT: Well, there's no -- well, we can -- I'm
25 not running a school on the different kinds of disabilities.

B. Shapiro - Redirect/Burt

1 That's -- we can go on forever doing that. I don't want to
2 open the door to something that wasn't within the context
3 of -- the overall context of this witness' report. That's the
4 point that's being made.

5 I'll let you ask your question; but if you think
6 this is opening the door to a new avenue of argument in terms
7 of the types of disabilities, you are going down the wrong
8 alley. It's a dead end, as far as I am concerned.

9 MR. BURT: I understand that.

10 THE COURT: You got the picture?

11 MR. BURT: I got the picture.

12 THE COURT: Because I'm not sitting here until
13 New Year's Eve to watch the ball drop in this courtroom.

14 MR. BURT: Judge, we're going to be finished on or
15 before December 11th, as I've said in our scheduling order.

16 THE COURT: Not based on where we are this afternoon
17 at 3 p.m. I'll tell you that.

18 Go ahead. Ask him your question. I'll take it for
19 what it's worth.

20 MR. BURT: Thank you.

21 BY MR. BURT

22 Q Do you remember the question?

23 A No, sir.

24 Q Which was, looking at the information that you reviewed
25 and the information that Dr. Drob had, is he correct in

B. Shapiro - Redirect/Burt

1 diagnosing Mr. Wilson with a learning disability?

2 A I think it's incomplete.

3 Q And could you explain why?

4 A Because I think he also meets -- Mr. Wilson also meets
5 criteria for intellectual disability.

6 Q Okay. And does the fact that Dr. Drob just diagnosed him
7 with a learning disability exclude the diagnosis of
8 intellectual disability?

9 A No.

10 Q What does the DSM say you do in a situation where you
11 have more than one disorder.

12 This is Slide 97, right?

13 A Well, if you have more than one disorder, you make the
14 diagnosis of both disorders.

15 Q What does that mean: Should be made, there is no
16 exclusion criteria? "Do not include an exclusion criteria."
17 What does that mean?

18 A So in the DSM-IV, for example, they say that if you have
19 the diagnosis of autism, you cannot make the diagnosis of
20 ADHD. What they're saying relative to intellectual disability
21 is that exclusion doesn't exist. If you meet criteria for
22 intellectual disability -- or, as they term it, mental
23 retardation -- then you should use that diagnosis, and there's
24 no exclusion on it.

25 Q Dr. Drob said in his report that he was diagnosing a

B. Shapiro - Redirect/Burt

1 learning disability because Mr. Wilson's verbal performance
2 was lower than his -- verbal IQ was lower than his performance
3 IQ, correct?

4 A Yes, he said that.

5 Q Do you agree with that?

6 A No.

7 Q Why not?

8 A Because in my clinical practice, I see learning
9 disabilities with all kinds of cognitive profiles. I don't
10 think that there is a specific cognitive profile for specific
11 learning disability.

12 Q Okay.

13 Now, you were asked a lot of questions about the
14 scores on your -- your summary sheet, correct?

15 A Yes.

16 Q This is Exhibit 44. Do you remember the discussion about
17 this exhibit?

18 A Yes, I do, very vividly.

19 Q Okay.

20 And you and the prosecutor went through this and she
21 made some changes and you agreed with them?

22 A I assumed that the information that she was giving me was
23 correct. It disturbed me because it didn't match my
24 recollection.

25 So last night I went home -- went back to the

B. Shapiro - Redirect/Burt

1 hotel -- I didn't go home -- and looked at the AAIDD manual
2 where they had a different age of standardization. Normative
3 sample for the WASI, which was the one that we had originally.
4 And it was originally normed in 1995 and then published in
5 1997. And then I went back to the original Flynn article --

6 MS. COHEN: I'm sorry. Can I just get a page number
7 from Dr. Shapiro?

8 THE WITNESS: Thirty-seven, middle of the page.

9 BY MR. BURT

10 Q Okay.

11 And so you started there?

12 A Correct.

13 And then I asked you to obtain the Flynn article for
14 me -- that's when I spoke to you last night -- because I
15 wanted to see what Flynn wrote since he defined the phenomena.
16 And --

17 Q And that's the article that's cited in the green book?

18 A That article is cited in the green book. That's the
19 Flynn 2006 article.

20 Q Okay.

21 MR. BURT: I've marked it as Defendant's Exhibit D.
22 And, unfortunately, I don't have a copy of this; but I will
23 get a copy for the Court and show the -- may I approach, your
24 Honor? Thank you.

25 THE COURT: Yes, you may.

B. Shapiro - Redirect/Burt

1 BY MR. BURT

2 Q Is that the article that you went back and checked on
3 last night?

4 A Yes, indeed.

5 Q Okay.

6 Is there a table in that article --

7 THE COURT: Excuse me. The Flynn article -- can we
8 just get a title and a date and so forth?

9 MR. BURT: Sure.

10 BY MR. BURT

11 Q Could you -- could you answer the Court's question?

12 A It's called "Tethering the Elephant: Capital Cases, IQ,
13 and the Flynn Effect" by James Flynn. That's F-L-Y-N-N. And
14 it was published in Psychology, Public Policy, and Law, 2006.

15 THE COURT: Thank you.

16 BY MR. BURT

17 Q Is there a chart or a table in that article which
18 references the date when the various tests were normed?

19 A The table that references the dates of when the different
20 instruments were normed is Table 1. And within that table, it
21 says that the WAIS-III was normed in 1995 and the WISC-III was
22 normed in 1989.

23 Q Okay. Could I see the table?

24 A (Hanging.)

25 MR. BURT: I would move D into evidence, your Honor.

B. Shapiro - Redirect/Burt

1 THE COURT: I'm waiting to hear from the Government.

2 MS. COHEN: Yes. I'm sorry. No objection to that.

3 THE COURT: And that's Defense D?

4 MR. BURT: Correct, your Honor.

5 THE COURT: All right. Defense D is received into
6 evidence.

7 And the Court will receive a copy of it as soon as
8 you have one?

9 MR. BURT: Yes.

10 THE COURT: All right.

11 (Defendant's Exhibit D received in evidence.)

12 MS. COHEN: Your Honor, for the record, I happen to
13 have my own copy.

14 THE COURT: Oh, I didn't ask for a copy for you. I
15 assumed you already had your own copy since you agreed to have
16 it in evidence.

17 MS. COHEN: Yes.

18 THE COURT: Okay. All right. Defense D is received
19 in evidence.

20 BY MR. BURT

21 Q And the chart you're referring to says, "All dates
22 assigned to tests refer to the date at which the test was
23 normed. This is what is relevant, of course, not the date
24 when the test was published."

25 And then the chart sets forth the dates when the

B. Shapiro - Redirect/Burt

1 tests were normed?

2 A Yes.

3 Q And it indicates that the WISC-C was normed in 1989,
4 correct?

5 A Correct.

6 Q And that the WAIS-III was normed in 1995, correct?

7 A Correct.

8 Q Did you do anything else to investigate whether your
9 original chart was correct in terms of the date of norm?

10 A Well, if you use those dates, then the changes proposed
11 by the Government are no longer correct.

12 Q Okay.

13 A In addition, one of the interesting -- there are two
14 other things that came up as a result of going back and
15 reviewing the chart.

16 One was that we contacted -- or asked you to contact
17 Dr. Alan Kaufman. Dr. Kaufman is an internationally known
18 personage who has a great deal of experience -- had extensive
19 experience with the Wechsler series. He's written any number
20 of articles and books about the subject. He has made
21 assessment his life's work and is recognized widely as an
22 expert on this area.

23 Q So you said you had me contact him. And did you rely on
24 the information which was produced as a result of that
25 inquiry?

B. Shapiro - Redirect/Burt

1 A I think that that information was illuminating because
2 Dr. Kaufman spoke about the difference between the copyright
3 on the normative sample and the normative sample. And his
4 statement was that the normative -- that you needed to do --
5 use the date that the sample was collected, and not the date
6 that it was published, which was the two-year-later date that
7 the Government put forth for us.

8 So the copyright date of the normative sample was
9 not the date that should've been used. It was the earlier
10 date.

11 Q And was that information conveyed to you in writing by
12 Dr. Kaufman last night?

13 A Yes.

14 MR. BURT: I've had marked next in order an E-mail.
15 It's Exhibit E.

16 May I approach, your Honor?

17 THE COURT: Go ahead.

18 BY MR. BURT

19 Q Did you rely upon that E-mail in forming your opinion
20 about whether your scores in the chart were accurate in terms
21 of the norming date?

22 A Yes.

23 MR. BURT: I move that into evidence, your Honor.
24 That's Exhibit E.

25 MS. COHEN: No objection, your Honor.

B. Shapiro - Redirect/Burt

1 THE COURT: All right. Exhibit E is received in
2 evidence without an objection.

3 (Defendant's Exhibit E received in evidence.)

4 BY MR. BURT

5 Q What was the question posed to Dr. Kaufman, and what was
6 his answer? Just read it verbatim, if you could.

7 A "Sorry to bother you, but we are in the middle of our
8 hearing and a question has come up that I hope you can answer.
9 For purposes of the Flynn effect, we're using 1989 as the date
10 of norming for WISC-III and 1995 for the WAIS-III. We got the
11 dates from Flynn's 2006 article attached. The 2005 date for
12 the WAIS-III is also cited in the AAIDD 2010 manual.

13 "The Government, citing the normative date and
14 copyright of 1991 in the WISC-III manual and 1997 normative
15 date and copyright in the WAIS-III manual, says that these are
16 the dates that should be used.

17 "Who is right about the dates? Is there a
18 literature cite for this besides what we already have?

19 "Your prompt reply would be greatly appreciated."

20 And then Dr. Kaufman responded. "The correct dates
21 are 1989 for the WISC-III and 1995 for the WAIS-III. The key
22 is" -- and this is capitalized -- "when were the individuals
23 and the standardization sample actually tested?" So he puts
24 some emphasis there.

25 "The copyright dates only apply to when the test is

B. Shapiro - Redirect/Burt

1 published and available for purchase. There is a lag time
2 between the collection of data and the subsequent analysis of
3 data, development of norms, and writing the manual. The
4 publication dates have nothing" -- and that's emphasis -- "to
5 do with the Flynn effect. The only dates of concern are the
6 dates of the actual testing."

7 Q Okay.

8 So based on that E-mail, based on your review of the
9 Flynn article, based on your review of the green book, do you
10 stand by the chart that you originally testified about on
11 direct examination that's in your report?

12 A Yes.

13 Q Okay.

14 Now, you were also asked a lot of questions about
15 things that Mr. Wilson has said or written since he's been
16 incarcerated, correct?

17 A Correct.

18 Q And do you recall any examples of his writing or his
19 language or ability -- verbal abilities that were presented to
20 you that did not relate to the period when he was
21 incarcerated?

22 A I'm sorry. You're going to have to refresh my memory as
23 to what you want me to --

24 Q Yeah. The only question is whether you recall any of the
25 examples that were cited to you during that nine hours of

B. Shapiro - Redirect/Burt

1 cross-examination that involve pre-18 verbal behavior; that
2 is, tape-recorded calls prior to 18 or writings prior to 18.

3 A No.

4 Q You had a slide -- and I'm not sure whether we explored
5 this or not, but relevant to the cross -- in which you set out
6 the standards on the issue of whether you can use verbal
7 behavior to diagnose or to not diagnose intellectual
8 disability, right?

9 A Correct.

10 Q And on that slide, you cited three sources. One was an
11 article -- well, let's start with the second one, which is the
12 green book, correct?

13 A Correct.

14 Q And what does it say?

15 THE COURT: Can I have the number of the slide for
16 the record, please.

17 MR. BURT: I'm sorry?

18 THE COURT: The number of the slide for the record,
19 please.

20 MR. BURT: Thank you. Slide Number 23.

21 BY MR. BURT

22 Q And the second reference on your slide is from the green
23 book, is it not?

24 Let's start with the third one. The last one there
25 is from the green book, page 102, correct?

B. Shapiro - Redirect/Burt

1 A Correct.

2 Q Okay.

3 And the full quote from the green book is: "Do not
4 use past criminal behavior or verbal behavior to infer level
5 of adaptive behavior or about having ID. Greenspan and
6 Switzky 2006 discussed two reasons for this guideline: There
7 is not enough available information and there is a lack of
8 normative information." Correct?

9 A Correct.

10 Q And the Greenspan article they're citing is the one you
11 have cited in the first part of your slide there?

12 A Yes.

13 Q Okay.

14 And what that says is "People with MR typically have
15 normal language syntax and can be very facile verbally."
16 Correct?

17 A Yes.

18 Q And that article is in evidence as part of Exhibit B, is
19 it not, in the literature finder?

20 A Yes.

21 Q Okay.

22 And would you turn to that article at page 292.

23 A (Witness complies.)

24 Q Do you have that in front of you?

25 A I do.

B. Shapiro - Redirect/Burt

1 Q I have it up on the screen, and the portion of it that I
2 have highlighted is "A problem with inferring non-MR status
3 from normal language is that it is contradicted by research
4 showing that adults with mild MR have relatively normal
5 syntax, grammar, and vocabulary. Their deficits are more in
6 the area of sociolinguistics, adjusting communication, and
7 taking into account informational leads of others rather than
8 psycholinguistics."

9 Is that true what that statement says?

10 A Yes. And I think that listening to the last two
11 telephone calls that Ms. Cohen put on demonstrates that
12 because to most people's ears that conversation that
13 Mr. Wilson had sounded pretty good, except that when I was
14 listening to it, or trying to listen to it, it seemed to me
15 that he was having difficulty with defining the concept of
16 "stringing along." It came at the end in terms of an
17 explanation.

18 And he also talked about illegitimate, when he was
19 talking of the child, and he then said "or whatever you want
20 to call it."

21 So there were a number of areas in his conversation
22 that suggested that the usage wasn't entirely proper,
23 appropriate.

24 Q Okay.

25 And then in the next paragraph, they say, "The same

B. Shapiro - Redirect/Burt

1 argument that we made in the previous section involving
2 problems in inferring MR status from someone's criminal
3 history can be made with respect to using material -- for
4 example, vocabulary, verbal fluency, or seeming degree of
5 verbal insight -- from a clinical interview. This is not
6 randomized data which is purely qualitative in nature and does
7 not really provide a basis for making diagnostic judgment.
8 People with MR typically have normal language syntax and can
9 be very facile verbally." Correct?

10 A With the exception and correction of a word that you
11 misread, which was "nonstandardized," as opposed to
12 "nonrandomized," yes.

13 Q Okay.

14 And do you agree with that, what's written there?

15 A Yes.

16 Q Okay.

17 And then on the very next page of that article,
18 there's a paragraph that begins "One interesting fact."

19 MS. COHEN: Can you zoom a little bit? I couldn't
20 see it.

21 Is this from the blue book, blue binder?

22 MR. BURT: Yes.

23 BY MR. BURT

24 Q There's a paragraph that begins there "One interesting
25 fact." Do you see that?

B. Shapiro - Redirect/Burt

1 A Yes.

2 Q Could you read that paragraph for us.

3 A "One interesting fact that we have learned about life on
4 death row is that condemned prisoners often spend a great deal
5 of time watching the History Channel, the Discovery Channel,
6 and other TV shows which contain relatively sophisticated
7 information about the world. As a result, Atkins defendants
8 may occasionally use words or make comments which one may
9 assume are beyond the repertoire of people with MR.

10 "Such exposure may be expected to elevate an
11 individual's general information and other crystallized
12 subscale scores and IQ tests, although it would likely not
13 affect the quality of one's fluid problem solving or
14 information-processing-based scores.

15 "Because isolated bits of data taken from
16 conversations or interviews can be misleading, the standard
17 practice is to use formal IQ assessment, rather than clinical
18 description, in determining the precise level of an
19 individual's cognitive deficits."

20 Q And what does that mean to you in terms of the usefulness
21 of interviews that were conducted, say, in 2011 or 2012 on the
22 issue of whether Mr. Wilson was intellectual disabled in 2003?

23 A I don't think that those -- I don't think that that data
24 is relevant to the question after 2003.

25 Q And why not?

B. Shapiro - Redirect/Burt

1 A For a number of reasons. One of the reasons is that
2 because people with intellectual disability may improve. And
3 we've talked about that before. One of the reasons is that
4 Mr. Wilson has made a substantial effort to improve himself
5 through reading dictionaries and through talking to people and
6 to -- learning words and, as a consequence, may -- and as
7 suggested here -- may have had those particular areas improved
8 over a previous ones on a cognitive assessment battery.

9 Q Okay.

10 Now, you were asked some questions about whether the
11 AAIDD is an advocacy group, correct?

12 A Correct.

13 Q In preparation for your testimony, did you read the
14 Court's opinion --

15 THE COURT: You don't have to go into that. I've
16 already ruled on that. And I don't care what the Government
17 is positing it as. I've ruled on that. It's a closed issue.
18 Let's move on.

19 MR. BURT: Okay. Thank you. That was my point.

20 THE COURT: Well, your point has been made. Go on.

21 MR. BURT: Thank you.

22 BY MR. BURT

23 Q You were asked some questions about the Flynn effect,
24 correct?

25 A Correct.

B. Shapiro - Redirect/Burt

1 Q And your attention was called to this slide, which is
2 Slide 57, where you quoted a 2003 article, correct?

3 A Correct.

4 Q Okay.

5 And the very next slide -- which, again, I'm not
6 sure we discussed on direct examination -- you set out the
7 position of the AAIDD on the use of the Flynn effect, correct?

8 A Correct.

9 Q In Slide 58?

10 A Correct.

11 Q And what is the position, as reflected on this slide?

12 A Well, there are a number of aspects to the position:
13 First, that the instruments that are used must be current.
14 The second is that the best practices require the recognition
15 of the Flynn effect. When -- older additions -- there's a
16 typo there. It's not order. It's older additions of an
17 intelligence test, with the corresponding older norms are used
18 in the assessment and interpretation, that does not allow you
19 to use an older exam when a more current one exists, but
20 requires you to use the most current, as happens that these
21 tests age. And at that point, you need to recognize a
22 potential Flynn effect at that point. And in the case where
23 the aging norms are used, you have to correct for the age of
24 the norms. And that is essentially what the Flynn effect
25 speaks to.

B. Shapiro - Redirect/Burt

1 Q Okay.

2 And in this case, looking from Exhibit A at your
3 chart, what you have is an instrument that was administered to
4 Mr. Wilson in 1989, the very first WISC-R instrument he was
5 administered, correct?

6 A Correct.

7 Q And at that time, the norms for that instrument had been
8 established in 1972?

9 A Correct. They were quite old.

10 Q And by the way, there are standards within the
11 psychological profession, are there not, which admonish and
12 guide practitioners to use current norms? It's not just the
13 AAIDD who says this, correct?

14 A Correct.

15 Q For instance, the American Psychological Association has
16 something called the "Standards for Education and
17 Psychological Testing"?

18 A Correct.

19 Q And that is a binding ethical guideline on psychologists
20 who practice, correct?

21 A Correct.

22 Q And it says, "Do not use outdated norms," does it not?

23 A Or "outdated instruments," yes.

24 Q Outdated instruments. Here the school psychologist was
25 using an instrument that was many years old. And the score

B. Shapiro - Redirect/Burt

1 that was obtained was a full-scale score of 84, correct?

2 A Correct.

3 Q When Mr. Wilson was tested two years later with an
4 updated instrument -- that is, an instrument -- the WISC-C
5 where the norms were established in 1989, so he's only two
6 years away from when the test was normed -- he got a much
7 lower score, much lower full-scale score, did he not?

8 A It was lower.

9 Q And is that the Flynn effect at play there? I mean, can
10 you look at those two scores and say this is good evidence
11 that Flynn is right because, otherwise, how do you account for
12 that lower score?

13 A I'm sorry. I initially looked at the corrected
14 full-scale scores. When you look at the full-scale scores,
15 it's half a standard deviation drop between the first and the
16 second score.

17 Q How many -- without Flynnning it, how many points does he
18 go down?

19 A He went down six points.

20 Q Six points. And if you Flynn the scores, they're almost
21 the same, are they not?

22 A Correct.

23 Q I mean, they're a point difference after you apply the
24 Flynn effect to those two scores?

25 A Correct.

B. Shapiro - Redirect/Burt

1 Q And what does that tell you about the accuracy of using
2 the Flynn effect?

3 A It suggests that the scores on the older normed tests
4 were elevated and that -- uncorrected, they were elevated.
5 When they were corrected, they were more in line with the
6 subsequent testing done when Mr. Wilson was 9 years and 7
7 months in 1991.

8 Q Okay.

9 Now, even apart from the Flynn test, you talked in
10 your direct examination about other factors that can influence
11 testing. And one of the things you mentioned, I think, was
12 the age at which the test was given, correct?

13 A Correct.

14 Q And one of the things you say in this publication,
15 "Children with Disabilities" --

16 A Yes.

17 Q -- is that "The predicted value of infant scores is
18 further limited because such tests are primarily dependent
19 upon non-language items whereas language skills remain the
20 best predictors of futurized IQ scores."

21 Did you write that?

22 A Yes.

23 Q Can you tell us what that means?

24 A When you -- when you're looking in terms of
25 prognosticating a child that you're evaluating, the best

B. Shapiro - Redirect/Burt

1 prognosticator that we have for future cognition is language.

2 Q Okay.

3 You also write in that book that "There's
4 substantial variability in IQ scores on repeated cognitive
5 testing and, consequently, poor predictive validity until
6 around 10 years of age."

7 A Yes.

8 Q Did you write that?

9 A I wrote that.

10 Q And what does that tell you in terms of relying on those
11 scores at age 6 and age 9 to predict what his IQ is at age --
12 around the time of the crime?

13 A It has limited predictive ability because of the
14 variability that we see even in the typical population, by the
15 way.

16 Q Now, you were also --

17 A It's not confined to folks with intellectual
18 disabilities. It's a characteristic of young children.

19 Q You were also asked some questions about practice
20 effects, right?

21 A Yes.

22 Q And you were asked to look at the scores, for instance,
23 the score -- the performance scores between '93 and '94 where
24 he got a 93 or a 90, depending on which score you choose on
25 that Nagler test, right?

B. Shapiro - Redirect/Burt

1 A Correct.

2 Q That's the one where she wrote down conflicting scores
3 for the performance IQ?

4 A Yes.

5 Q And if you compared the Nagler and the next score down,
6 which is the -- I'm sorry -- the Aranoff and the Nagler
7 scores, his performance goes from 93 and then down to 80,
8 correct?

9 A Yes.

10 Q Now, can you look -- just look at those two scores and
11 say, well, that must mean there's no practice effect, given
12 what you said on direct examination about the number of
13 variables that can play into how one obtains a score?

14 A No. And I think that you can't just look at a single
15 score and say this is the cause. As is true, all
16 assessment -- and, particularly, the cognitive assessment --
17 is evaluating multiple different functions that are
18 interplaying at the same time. Some of them have to do with
19 the individuals. Some of them have to do with the examiner.
20 Some of them have to do with the test. So we can look at
21 these things, but it's hard to say that one thing, and only
22 that thing, operates.

23 Q For instance, if -- you said the condition of the
24 examinee is one thing that can affect the score, right?

25 A Yes.

B. Shapiro - Redirect/Burt

1 Q I mean, after all, what you're doing in these IQ tests is
2 you're taking a snapshot of a kid's performance on a certain
3 day under certain conditions, correct?

4 A And assuming that it is the best performance that child
5 can do, yes.

6 Q And you're hoping that your score is going to reflect
7 longstanding intellectual traits of that person?

8 A You're hoping that the score will reflect the child's
9 abilities in cognitive areas.

10 Q However, I think you said on direct examination that
11 there's lots of variables that can predict what happens on a
12 particular day?

13 A Yes.

14 Q The examiner makes a mistake, the person being examined
15 is tired, the examiner is someone who overestimates or
16 underestimates. All those thing can play into it --

17 A Correct.

18 Q -- right?

19 So if you have some variable affecting the score --
20 for instance, saying the person is not performing up to his
21 maximum and at one point he gets a 93 and the next point, he
22 gets an 80 -- does that necessarily mean that there's no
23 practice effect?

24 A No. It just may mean that there are other factors that
25 were operational at the same time.

B. Shapiro - Redirect/Burt

1 Q I mean, the literature that you cite in your PowerPoint
2 seems to indicate, does it not, that the practice effect is
3 always in play when you give a similar test over and over and
4 over again.

5 You've got slides that say that, do you not?

6 A I do.

7 Q Backed up by the literature?

8 A I do.

9 Q So is it your opinion that at any point in the series of
10 scores that Mr. Wilson was given, that the practice effect was
11 not in play, that it had no effect given the number of times
12 he was administered these instruments?

13 A It was in play. You may not have seen it reflected
14 necessarily in the scores.

15 Q Because some other variable may be at play that reduces
16 it?

17 A Correct.

18 Q So the practice effect may add -- that Kaufman cites, you
19 have, indicates five to eight points on the performance end of
20 it?

21 A Correct.

22 Q That five to eight points could have been counterbalanced
23 by some flaw in the scoring or some variable that we don't
24 know about?

25 A Correct.

B. Shapiro - Redirect/Burt

1 Q But the practice effect is still adding the points?

2 A Correct.

3 Q At any point in the process?

4 A Correct.

5 Q Okay.

6 You were asked some questions about Dr. Aranoff's
7 report and some of the other prior evaluators' in this case.
8 Do you recall those questions?

9 A Yes.

10 Q And the point of it, I guess -- and correct me if I'm
11 wrong -- was, well, all these people evaluated him and they
12 used clinical judgment and, therefore, since they didn't
13 diagnose him with intellectual disability, there must be no
14 intellectual disability?

15 A I believe that was the gist of the questioning.

16 Q Okay.

17 And I think that a real point was made in getting
18 you to concede that clinical judgment was important, and you
19 agreed it was important --

20 A Yes.

21 Q -- right?

22 The green book has a whole chapter on clinical
23 judgment, doesn't it?

24 A Yes.

25 Q And it says, does it not, on page 87, "Clinical judgment

B. Shapiro - Redirect/Burt

1 should not be thought of as a justification for abbreviated
2 evaluation, a vehicle for stereotypes or prejudice, a
3 substitute for insufficiently explored questions, an excuse
4 for incomplete or missing data, or a way to solve political
5 problems."

6 Isn't that what it says in terms of clinical
7 judgment?

8 A Yes.

9 Q Okay.

10 And you reviewed the records in this case, correct?

11 A Correct.

12 Q Mr. Wilson started to be evaluated by mental health
13 professionals when he was 6 years old; isn't that correct?

14 A Correct.

15 Q And he continued to be evaluated by mental health
16 professionals all the way up until and past when he reached
17 age 18?

18 A Yes.

19 Q At any point in time in that chain of events, did any of
20 these mental health professionals have the information that
21 you had available in this case?

22 A No.

23 Q Is that significant in terms of the use of clinical
24 judgment?

25 A I believe so.

B. Shapiro - Redirect/Burt

1 Q Why?

2 A Because I think that in terms of understanding some of
3 his behavior, the fact that he suffered brain injury
4 associated with his meningitis and documented by the PET scan
5 of Dr. Buckbaum -- which, by the way, doesn't make the
6 diagnosis of intellectual disability. It just points to the
7 fact that this is a brain that is not working the way the
8 typical brain works -- suggests -- would be influential in
9 terms of considering this child's condition in an overall
10 sense.

11 MS. COHEN: Your Honor, I'm going to object to that
12 line of questioning in that Dr. Shapiro is asked about what
13 these test administrators had in their records. I don't think
14 there's been any foundation here as to what they did or did
15 not have in their records when they evaluated Mr. Wilson.

16 MR. BURT: Well, the records are in evidence. So
17 there certainly is 10,000 pages of foundation in terms of what
18 the records show. And I'm going to develop with him what it
19 shows. So it's not true that the record doesn't show what
20 they have. We have the records. They're in evidence.

21 MS. COHEN: Actually, that's not true, because every
22 test evaluator had raw data. And that is not in the record.
23 So when the records were compiled back in time, there were a
24 lot of records that were missing from this. So we don't
25 actually know what the evaluators had at the time.

B. Shapiro - Redirect/Burt

1 MR. BURT: I disagree with that characterization,
2 but it goes to the weight. It certainly doesn't affect the
3 admissibility of the opinions, given what they tried to imply
4 on cross, which is how could all these people not -- how could
5 they have missed this diagnosis if it was present. And
6 there's an answer to it that I'd like to explore.

7 THE COURT: Go ahead.

8 BY MR. BURT

9 Q You were explaining that the -- the information that you
10 looked at in the records did not seem to indicate that the
11 people who were diagnosing had information such as the fact
12 that Mr. Wilson suffered from meningitis, correct?

13 A Correct.

14 Q Okay.

15 And the records that you reviewed, beginning at
16 page GOV 27, contain hospital records showing that Mr. Wilson
17 was admitted to the hospital in 1984 and diagnosed with viral
18 meningitis, correct?

19 A It was meningococcal meningitis. It was bacterial
20 meningitis.

21 Q Bacterial meningitis. Okay.

22 And I think you state in your report and you
23 testified on direct examination that that particular type of
24 meningitis is a risk factor for intellectual disability,
25 correct?

B. Shapiro - Redirect/Burt

1 A Correct.

2 Q And you cite in your report some literature that shows
3 that people with bacterial meningitis are more likely to be
4 referred to special education programs?

5 A Correct.

6 Q Now, those -- that hospitalization in 1984 occurred when
7 Mr. Wilson was very young, correct?

8 A When he was 20 months old.

9 Q Okay.

10 And what does the literature show in terms of
11 someone getting viral meningitis at that young age in terms of
12 the longterm effects, neuropsychological effects of that
13 disorder, or disease?

14 A Well, it shows a substantial minority of people who had
15 cognitive dysfunction at follow-up a number of years later.

16 Q Okay.

17 And in this case, did you have to speculate whether
18 there was longterm effects, given the fact that a snapshot of
19 Mr. Wilson's brain activity was taken around the time of the
20 crime, by Dr. Bucksbaum?

21 A Could you repeat the question?

22 Q Yeah.

23 Did you have to speculate about the effects of that
24 meningitis, given the fact that you had testified just a
25 moment ago that you had a PET scan reading around the time of

B. Shapiro - Redirect/Burt

1 Mr. Wilson's trial?

2 MS. COHEN: Objection, your Honor. This is outside
3 the scope of the cross. We never went into his PET scan.

4 MR. BURT: It goes to why these people missed the
5 diagnosis, because they didn't have the information that these
6 experts have and are using to form their opinions. And he
7 talked about it on direct. She brought out on cross that --
8 well, how could these people possibly have missed the
9 diagnosis? And the Court's going to see the answer in a
10 moment, which is they -- there's positive documentation that
11 they were mislead into believing that Mr. Wilson had no prior
12 hospitalizations involving anything as serious as this
13 meningitis. So I think that that's --

14 THE COURT: How does he know that? How does he know
15 that they had no knowledge?

16 MR. BURT: Because there are records documenting a
17 prior hospitalization inquiry, with an answer. And those
18 records were relied upon in making the diagnosis. In other
19 words, the diagnostic records have things like, you know,
20 prior medical history with the words "none" written in there.

21 THE COURT: What do you need him for if you've got
22 that?

23 MR. BURT: Well --

24 THE COURT: You have a record, and you can put it in
25 your papers.

B. Shapiro - Redirect/Burt

1 MR. BURT: Yeah.

2 THE COURT: I don't need him to go into it, do I?

3 MR. BURT: Well, I need him to explain to the Court
4 how the testing, the PET testing, around the time of the crime
5 shows us that the meningitis has a longterm effect that plays
6 in his opinion. And his opinion was being attacked on
7 cross-examination. This is responsive to the point that he
8 must be wrong because these other doctors didn't diagnosis him
9 and, therefore, we should put weight in their opinions.

10 MS. COHEN: Well, first of all, your Honor, the
11 witness testified that the cause has nothing to do with the
12 diagnosis. So sometimes you can't determine the cause. And
13 we weren't going into that. We were just simply saying --
14 asking the individual -- asking Dr. Shapiro to answer the
15 question of whether or not these other doctors recognized it.
16 And we went through that.

17 But we didn't talk about the PET scan. The PET scan
18 actually isn't even something that's necessarily used to
19 diagnose mental retardation. It's used to scan the brain; in
20 this case, to look at the meningitis issue, which would go to
21 cause.

22 What we were talking about was, were there symptoms,
23 did mental retardation exist before the age -- was the onset
24 before age 18. And that's what we were going through with the
25 record. We didn't talk about the PET scan and the cause of

B. Shapiro - Redirect/Burt

1 it.

2 So I don't see how now, on redirect, he's going to
3 go into the PET scan, which had nothing to do with the cross.

4 MR. BURT: That's the very point, that they didn't
5 talk about it. And it's relevant.

6 THE COURT: Who's "they"?

7 MR. BURT: The Government.

8 THE COURT: You could have raised that on direct as
9 to -- these were your statistics. They're weren't the
10 Government's statistics.

11 MR. BURT: I understand. We did -- we did raise it
12 on direct. And I'm trying to respond to the argument the
13 Government made in terms of, you know, this diagnosis couldn't
14 have been messed early on. And I'm trying to explain to the
15 Court how it was missed. That's all.

16 MS. COHEN: Your Honor, I have no recollection of
17 the PET scan even being discussed on direct examination. It
18 was not in any of the slides. And my recollection is when we
19 finished the slides, he asked about adaptive functioning.
20 That was my recollection.

21 But, obviously, the record speaks for itself.

22 MR. BURT: We put the reports into evidence. The
23 reports discuss the PET scan. I'm trying to pinpoint his
24 discussion, which is already admitted, in order to explain the
25 lack of prior diagnosis. That's all. And I could've been

B. Shapiro - Redirect/Burt

1 through with this by the time we just spent arguing.

2 THE COURT: Yeah, but that's not the point.

3 MR. BURT: I understand.

4 THE COURT: The point is whether we're going to open
5 this record up and bring in a lot of other witnesses to talk
6 about why they -- whether they did or did not consider the
7 PET scan, whether it was relevant to anything that we're
8 deciding here today.

9 You know, you're relying on numbers. And now, in a
10 way, you're taking issue with the numbers that you're relying
11 on. So, you know, there's a lot of -- there's a lot of play
12 here. If you want to ask him about the PET scan, go ahead.

13 MR. BURT: Thank you.

14 THE COURT: But I think from my vantage point, a lot
15 of this discussion moves into the area of speculation.

16 MS. COHEN: Yeah.

17 THE COURT: And I just warn you that, you know, I'm
18 not encouraged by a litany of speculative discussion about
19 what all this means, because it's just -- we had a lot on the
20 record as to what it means, and now we're going back and
21 you're taking issue with the numbers. You're not really
22 taking issue with the Government. You're taking issue with
23 whether much of this is reliable. And these are your -- you
24 put in this chart, and the question is reliability. And the
25 question for me is: If one test administration wasn't

B. Shapiro - Redirect/Burt

1 reliable, why was another test administration reliable? And I
2 don't think I've got any answers to that from what I've heard
3 thus far.

4 But go ahead. You can ask.

5 MR. BURT: All right, thank you, your Honor.

6 THE COURT: And I have a question for this document.

7 Go ahead.

8 BY MR. BURT

9 Q My only point, Doctor, is the meningitis at this early
10 age, compared against a PET scan of Mr. Wilson's brain around
11 the time of the crime, does that tell you anything in terms of
12 whether there was permanent brain damage from that PET scan?

13 A The way that I interpret the PET scan data is that
14 Mr. Wilson has an abnormally functioning brain, particularly
15 in the frontal lobe areas. It could be caused by a wide
16 variety of things; but the most likely, given his history, is
17 probably the meningitis. But it could have been done by
18 anything that occurred before the time of the PET scan,
19 including things like trauma, fetal drug and alcohol exposure
20 potentially. So there are a number of things. I can't put a
21 one-to-one linkage between the meningitis and the scan, only
22 to say that he has an unusual-functioning brain.

23 Q Okay.

24 And I think what you also said was meningitis is a
25 risk factor for intellectual disability?

B. Shapiro - Redirect/Burt

1 A Yes.

2 Q Now, in your review of the records, you saw that he was
3 admitted to Elmhurst psychiatric hospital at a very early age,
4 correct?

5 A Correct.

6 Q Eventually given in that hospital, when he was still
7 about 6 years of age, Thorazine and other drugs?

8 A Correct.

9 Q And did you see in the records where his aunt reported --
10 I believe it's in the Mitchell Franks record summary -- that
11 despite being given drugs from the age 7 up to the age 14, his
12 behavior did not improve?

13 A Yes.

14 Q And what does that tell you in terms of whether what he
15 was suffering from was a psychiatric disorder or an
16 intellectual disability, given the lack of response to
17 psychiatric drugs?

18 MS. COHEN: Again, objection, your Honor. This
19 is -- now we're getting, again, way outside the scope.

20 MR. BURT: Well, the scope of nine hours of
21 cross-examination --

22 THE COURT: Don't talk to me -- let's -- look,
23 there's no jury here, okay? So let's not gild the lily about
24 how long the cross-examination took.

25 MR. BURT: All right.

B. Shapiro - Redirect/Burt

1 THE COURT: Let's just -- I've listened to it --
2 you've said it several times. I heard it the first time. You
3 know, I'm not suffering from an intellectual disability. I
4 remember what you said, okay?

5 MR. BURT: I apologize.

6 THE COURT: So let's not do the jury thing here.
7 Let's just stick with the issues. And you're doing that to a
8 great extent. But we don't have to embellish. Embellishment
9 is not appreciated. I just want to move ahead.

10 MR. BURT: I understand.

11 THE COURT: So forget about the nine hours. Let's
12 talk about the issue.

13 What's the answer to the question -- the argument
14 posed by the Government?

15 MR. BURT: Your Honor, the issue is it's beyond the
16 scope of cross-examination. And the scope -- my point was,
17 was that it was very wide and suggested that this witness was
18 incorrect in his diagnosis because prior examiners had not
19 diagnosed this as an intellectual disability.

20 And I will try and show the Court, through this line
21 of questioning, that these doctors at any point in time did
22 not have available the kinds of cross-sectional information
23 which our experts now have available. For instance, they
24 didn't know that Mr. Wilson had seven or eight years of
25 psychiatric medications, with no response to it. So, of

B. Shapiro - Redirect/Burt

1 course, they're not going to think intellectual disability,
2 because they didn't have that information. So that explains
3 why they didn't diagnose him with intellectual disability.

4 And it also explains why this expert is able to
5 reach that diagnosis, because he had that information. They
6 didn't.

7 MS. COHEN: Again, your Honor, this is speculation
8 about what they had, what they did not have. There's a lot in
9 the records about the drugs that were administered. So to say
10 that the people giving the tests didn't know this, or what
11 they knew, it's complete speculation.

12 MR. BURT: It is not. If he is given a diagnosis at
13 age 6 and that examiner then -- he's passed on to somebody
14 else who for the next ten years gives him psychiatric meds,
15 and he doesn't respond, then it's not speculation that the
16 first doctor didn't have that information, because it didn't
17 come into existence until after the diagnosis was made. It's
18 not speculation.

19 THE COURT: Well, I think he's already answered the
20 question, hasn't he? You talked about the PET scan, and he
21 said -- the doctor said it could be caused by a wide variety
22 of things, but the most likely, given his history, is probably
23 the meningitis, but it could've been anything that occurred
24 before the time of the PET scan, including things like trauma,
25 the medication, and alcohol exposure potentially. So he's

B. Shapiro - Redirect/Burt

1 saying -- he says, according to the real-time transcript, "So
2 there are a number of things."

3 MR. BURT: Right. I'm beyond the PET scan. I'm now
4 in a different area, which is what does it tell him that this
5 child had seven or eight years' worth of drug meds and his
6 behavior was not improving. And that is in the evaluation
7 that the Government featured in its cross; that is, the
8 Mitchell Franks evaluation that she confronted Dr. Shapiro
9 with and said, you know, we have all these evaluations.

10 THE COURT: All right. I'll let you do it, but he
11 may be here tomorrow on redirect. So I'm just warning you
12 that you opened -- you're expanding it, and I'm going to give
13 them latitude to go into it. So I hope Dr. Shapiro has a
14 comfortable bed tonight in a very nice hotel.

15 Go ahead.

16 THE WITNESS: I will try to be brief.

17 THE COURT: Well, that will be a nice change for
18 this hearing.

19 A In terms of when you see a treatment failure, there are a
20 number of things that you need to think about. You need to
21 think about whether you have the right diagnosis. Probably
22 more likely in Mr. Wilson's case is the issue of incomplete
23 diagnosis, which is that several of the diagnoses that were
24 made were probably right at the time, but did not capture the
25 full amount. The third thing would be the wrong medications.

B. Shapiro - Redirect/Burt

1 The fourth thing would be the wrong doses of medications. And
2 the fifth thing would be compliance, would be the main things
3 that I would think about if my treatment program wasn't
4 working.

5 BY MR. BURT

6 Q Okay.

7 And how about that he doesn't have the disorder that
8 the meds are supposed to be addressing?

9 A That would be placed under the wrong medication.

10 Q In other words, they're thinking ADHD or some other
11 disorder and he's not responding to the Ritalin or the
12 Thorazine. I assume they were thinking some psychotic
13 disorder, right?

14 A They're using it as a nonspecific sedative at that point.

15 Q And if he's not responding, the inference -- one
16 inference would be maybe he doesn't have ADHD, maybe he's got
17 something else?

18 A Right.

19 Q Okay.

20 THE COURT: Now, Doctor, you seem to imply that
21 language skills at an early age are a significant indicator of
22 the lack of or the existence of intellectual disability. Is
23 that a fair statement?

24 THE WITNESS: It's a very common presentation for
25 intellectual disability, is language delay.

B. Shapiro - Redirect/Burt

1 THE COURT: Okay. But that verbal skills or verbal
2 statements, as we had in the -- in whatever we call the MDC
3 tapes, are -- lack indicia of significance in determining the
4 current state of intellectual disability. Is that -- is that
5 a fair summary or conclusion based on what you've already
6 said?

7 THE WITNESS: Yes. And let me expand on it just a
8 little bit.

9 THE COURT: I'd appreciate it. And I'd like to know
10 what the difference is between, you know, the two what it
11 would seem are related or overlapping issues.

12 THE WITNESS: The way that most young children, very
13 young children, present is having too few words, okay? And
14 what we're talking about relative to the older children and
15 young adults is the usage. So they have enough words. It's
16 their usage that seems to be impaired.

17 THE COURT: And how are we going to know whether
18 someone who's watching the History Channel has too few words
19 as an adult, young adult, or whether the person's not even
20 watching the History Channel or -- or watching the nature
21 channel or watching PBS at the MDC? How do you have any idea
22 whatsoever whether the language being used in those tapes has
23 any relationship at all to watching any type -- particular
24 type of television?

25 THE WITNESS: One of the ways that you might

B. Shapiro - Redirect/Burt

1 approximate an answer to that question is looking to see
2 whether they are fairly stereotyped phrases that are in the
3 language that is there.

4 So, for example, in the case of Mr. Wilson, there's
5 an awful lot of his language that pulls from music songs. So
6 when he's talking about things, there's continual leitmotif
7 that the Government presented that suggested that a good deal
8 of what his conversation revolves around and he uses as a
9 means of communication is pulled from contemporary music.

10
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12 (Continued on the next page.)
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B. Shapiro - Redirect/Burt

1 THE COURT: And what does that mean, if anything?

2 THE WITNESS: So that he will have bits and phrases
3 and themes that are there in songs, and pull them in as a
4 method of communicating, so he uses those kinds of techniques.

5 THE COURT: So -- but what does that tell you, if
6 anything?

7 THE WITNESS: Well, it may tell you that in terms of
8 his own generation of things de novo, that it's limited and he
9 depends on those other structures to help him communicate.

10 THE COURT: Would it be significant to you in any
11 way that Mr. Wilson has experience writing rap?

12 THE WITNESS: He may use the same themes that he
13 pulled from other rap songs to write his own rap.

14 THE COURT: And does that tell you anything about
15 his intellectual acuity?

16 THE WITNESS: It would tell you about his verbal
17 ability. And the point is that you should not make the
18 inference that he is reasoning just because he is using bits
19 and pieces of things that he pulls from the world around him.

20 THE COURT: But you can reaching a conclusion as to
21 whether he's reasoning by -- can you not -- by listening to
22 and understanding his interaction with another person with
23 whom he's having a conversation, as to the substance as
24 opposed to the actual words?

25 THE WITNESS: Correct. And that has to do more with

B. Shapiro - Redirect/Burt

1 the topic that I tried to bring up, in terms of the
2 superficial language that people use for cocktail talk, is not
3 very -- shows very much reasoning, that most people talk about
4 at cocktail parties, whereas the deeper in terms of the how --
5 how and the why kinds of questions that get to the motivations
6 and more competencies that are based on reasoning come from
7 that.

8 THE COURT: Well, the conversation that he had with
9 the woman who claimed or appeared to claim that he was the
10 father of her baby, her child, that wasn't cocktail party
11 conversation. That was serious, if not terribly articulate on
12 the part of the woman. That was serious conversation. He
13 wouldn't have that conversation at a cocktail party -- unless
14 it was in the movies.

15 THE WITNESS: Correct.

16 THE COURT: Okay. So we're not in the movies.
17 We're in the real world here.

18 THE WITNESS: Okay.

19 THE COURT: So where does that fit in this overall
20 picture, if you will?

21 THE WITNESS: Well, I think that when I was
22 listening to it, I must say there was a lot to listen to in a
23 short period of time. There were some errors in usage that he
24 made during the course of that conversation.

25 The other thing that I thought it expressed was his

B. Shapiro - Redirect/Burt

1 concern for another human being, and the particulars in terms
2 of the back and forth about the test. I don't -- can't say
3 what that was -- what that implied.

4 THE COURT: Well, we all learn from lots of
5 different sources.

6 THE WITNESS: Correct.

7 THE COURT: And you may learn a lot from television,
8 right? And so, your vocabulary is a combination of concepts
9 of words that you've learned from your overall experience.

10 So you may learn more by talking to the person in
11 the next cell than you're learning from a television show.
12 You have no way of knowing from whence the defendant learned
13 some of words that he used in the conversation with this woman
14 or with anybody else. Isn't that fair to say?

15 THE WITNESS: That is absolutely fair to say.

16 THE COURT: Well, how much more do you have on
17 direct examination?

18 MS. COHEN: None.

19 THE COURT: Redirect.

20 MS. COHEN: Yeah --

21 THE COURT: I'm doing redirect here.

22 MS. COHEN: Oh, I'm sorry.

23 THE COURT: Redirect.

24 MS. COHEN: I'm sorry, Your Honor.

25 THE COURT: Mr. Burt?

B. Shapiro - Redirect/Burt

1 MR. BURT: I probably have a half an hour.

2 THE COURT: A half an hour? We'll take a
3 fifteen-minute break.

4 I said redirect. All right. Thank you.

5 (Recess.)

6 THE COURT: All right. The witness will retake the
7 stand, please.

8 THE WITNESS: Thank you.

9 (Witness resumes the stand.)

10 THE COURT: Okay. You may continue.

11 Please be seated, everyone.

12 All right, Mr. Burt. You may continue.

13 While we're waiting for the defendant, just have a
14 seat, sir.

15 THE WITNESS: Thank you.

16 THE COURT: Just waiting for the defendant.

17 (Defendant enters.)

18 THE COURT: All right. The defendant is present.
19 You may continue, sir.

20 MR. BURT: Thank you.

21 BY MR. BURT:

22 Q I want to focus for a minute on a question the Court
23 asked, which is, how do you know what influences he has been
24 exposed to in a custodial setting in terms of judging his
25 language? That's context, right. You've got to know what

B. Shapiro - Redirect/Burt

1 influences he has had and what impact they have had on him in
2 terms of judging his language?

3 A That's correct.

4 Q And is that the whole reason why they say don't rely on
5 verbal behavior, because we don't know enough about the
6 context? Is that what they mean when they're referring in the
7 book to the context?

8 A You're talking about the Classification Manual?

9 Q Yeah, in the green book. Do not use verbal behavior?

10 A Yes.

11 Q Context in the sense of, we don't know what educational
12 efforts he has been exposed to, what influences, what he's
13 read, what he's seen, those types of things?

14 A And what people ever taught him.

15 Q Now, in the earlier time period, there are people who
16 evaluated his verbal skills in a clinical setting, correct?

17 A Correct.

18 Q And one of the people that your attention was brought to
19 on cross-examination was Mitchell Franks. Do you recall those
20 questions on cross-examination?

21 A Yes.

22 Q And he was a court evaluator who was evaluating
23 Mr. Wilson in 1997, not for purposes of an educational
24 evaluation, but as part of a court assessment process?

25 A Correct.

B. Shapiro - Redirect/Burt

1 Q His information is listed on your chart, is it not, but
2 there's no scores indicated?

3 A That's correct, because he gave a number of subtest
4 scores, but did not give a full WISC battery.

5 Q Okay. So he didn't give enough of the test to be able to
6 compute a verbal or a performance or a full IQ test?

7 A That's correct.

8 Q However, he did write a report that's in the records that
9 you reviewed, correct?

10 A Right.

11 Q And I think you were asked on cross whether you did
12 review it?

13 A Yes.

14 Q Okay. Now, one of the things he says in that report --
15 and this is at GOV 3980. He says, quote, Earl Wilson, a 14,
16 11 month-year-old male responded, who usual actually sucked
17 his thumb when not replying to questions, was passively
18 cooperative with the interview procedure, replying to
19 questions in brief, occasionally mumbled answers, using a
20 limited and concrete vocabulary. Do you have that in front of
21 you?

22 A 3980?

23 Q 3980.

24 A Yes, I do. (Peruses document.)

25 Q Do you see that under "Clinical Interview"?

B. Shapiro - Redirect/Burt

1 A Yes.

2 Q And this is Dr. Franks not reviewing jail conversations,
3 but actually clinically evaluating Mr. Wilson for his language
4 skills in a clinical setting, where he's controlling what the
5 interaction is, right?

6 A Yes.

7 Q And what does that mean when he says, "Limited in
8 concrete vocabulary"?

9 A He's using that in terms of the fact that his total scope
10 of words that he used during the interview was not as large as
11 he would have expected for a 14 year, 11 month old, and he
12 felt that the words that he used were not as expansive.

13 So then in other words, that might be used -- they
14 were much like more like words explaining the who, what, where
15 kind of questions, rather than the more abstract kind of
16 language that's used, like feelings and things like that.

17 Q Okay. Then he says on the next page -- this is at 3981
18 -- "Because of the limited vocabulary of the respondent during
19 the interview, the examiner tested respondent with four
20 subtests from the Wechsler Intelligence Scale for Children,
21 Third Edition, and with one nonverbal subtest from the same
22 instrument."

23 A Yes, I see that.

24 Q Right? So in other words, he's giving him a partial
25 battery at this point?

B. Shapiro - Redirect/Burt

1 A Correct.

2 Q And he says, "The respondent's score on all four
3 subtests, which tested for general knowledge, understanding of
4 social norms, concept for formation ability and arithmetic
5 calculation yielded scores consistent with a mildly deficient
6 range of cognitive abilities."

7 What does that language mean, "Within the range
8 of -- consistent with mildly deficient range of cognitive
9 abilities"?

10 A Well, the four subtests that he used were information,
11 which is the general knowledge that appears to be,
12 comprehensive, which is the understanding of social norms,
13 concept formation abilities, similarities, and arithmetic
14 calculation yielded scores consistent with mildly deficient
15 range of cognitive abilities, which means that that his
16 subtest scores were more than two standard deviations below
17 the mean, equating to subtest scores probably of four or less.

18 Q Four or less? Okay. So he is indicating here scores
19 consistent with a mildly deficient range of cognitive
20 abilities?

21 A Correct.

22 Q Meaning intellectual functioning --

23 A Yes.

24 Q -- within the first prong that we're talking about?

25 A Yes.

B. Shapiro - Redirect/Burt

1 Q Okay. Then he says, "On the other hand, the nonverbal
2 subtest employed which tests for visual recognition of the
3 environment and visual scanning ability, indicated average
4 level abilities in this sphere." Right?

5 A Right.

6 Q So he's given one performance subtest?

7 A Yes.

8 Q And he's coming up with a normal score there?

9 A Yes.

10 Q Which is consistent with a pattern that you observed in
11 all the other scores, correct?

12 A Correct.

13 Q Okay. And then he says, "Overall intelligence is
14 estimated as being in the borderline range, though it is a
15 critical factor that the respondent is significantly limited
16 in the verbal area." Correct?

17 A Correct.

18 Q And then he reaches an Axis II diagnosis of borderline
19 intellectual functioning. And he says underneath that, "This
20 is a fairly limited youth intellectually, with probably even
21 more debilitating limitations in the way of his social
22 behavioral developmental level. There is danger that is
23 exploitable criminally because of the above issues."

24 That was his clinical opinion, correct?

25 A Correct.

B. Shapiro - Redirect/Burt

1 Q And is that consistent or inconsistent with your
2 diagnosis of mild intellectual disability in this case?

3 A It's consistent.

4 Q And can you tell us why?

5 A It's consistent because of fact that even though he did a
6 limited battery, and I think that we need to be cautious to
7 some degree about his conclusion to Axis II, because it was a
8 limited battery -- that he recognized that there was a
9 substantial verbal performance discrepancy, and then he
10 exercised his clinical judgment as a result of his
11 interactions with Mr. Wilson, and concluded that he was
12 limited, and that the function was limited, as well.

13 Q Now, the language that -- or his verbal abilities that he
14 characterizes here as limited in concrete, those are different
15 than how would you characterize the jail conversations from
16 2012?

17 A Correct.

18 Q And so what accounts for that difference? How can he go
19 from being intellectually impaired at 14 and-a-half to
20 something better in 2012? How does one advance in those
21 verbal areas.

22 A (Peruses document.) Well, the general knowledge is
23 something that with greater exposure, he might show some
24 improvement on there, information.

25 Q Greater exposure in what sense?

B. Shapiro - Redirect/Burt

1 A To academics and academic-type pursuits, which would have
2 to do -- which he did in the jail situation.

3 Q And by -- this is an at age 14, right? This is
4 pre-Brookwood?

5 A Yes.

6 Q And Brookwood, as you understood it, was just a lockdown
7 or was there an actual effort there to try to program these
8 kids in terms of developing them intellectually and
9 educationally?

10 A My impression, after talking to Mr. Gilio was that
11 Brookwood was a -- had a therapeutic aspect to it as well as a
12 penal aspect to it.

13 Q Is one indication of that the volume of records that were
14 produced from that institution?

15 A Yes.

16 Q I mean, in a place that's just a lockdown, you don't tend
17 to get a lot of records, do you?

18 A I don't know the answer to that question.

19 Q Okay. Here, these are the Brookwood records. This is in
20 C-4, quite a bit of workup on him during that time period,
21 which as you look on the chart there, was for about a year?

22 A Yes.

23 Q Right? Exposed to educational programs, including
24 computer literacy programs. Did you note that on your
25 records?

B. Shapiro - Redirect/Burt

1 A Yes.

2 Q What would you expect if there was efforts to educate
3 someone with a mild disability? Would you expect that they
4 would have no progress, some progress, little progress?

5 A I think when we're talking about people with intellectual
6 disability, they have the capacity for making progress, it's
7 just at a slower rate. So he would be expected to make
8 progress.

9 Q Okay. And you saw the workup that was done on him in
10 November of 1999, just before he was released?

11 A Are you referring to the workup by Mr. Gilio?

12 Q Well, I'm referring to the workup from the Brookwood
13 folks and specifically, page 3478, which is sort of a
14 discharge summary.

15 A I don't remember seeing this one before.

16 Q Okay. Let me ask you about it. This shows skills.
17 Apparently, as is typical in the record, these records, they
18 list what the goals are and then note the progress, right?

19 A Yes.

20 Q So on this page, they have skills, personal competency,
21 and they note that in June of 1998, he made some progress. A
22 year later, he made some progress. And a year, in November of
23 '99, they note very good progress in the area of academics.

24 Is that an atypical pattern for someone in a highly
25 structured environment who is exposed to educational programs

B. Shapiro - Redirect/Burt

1 to make that kind of program progress or is that inconsistent?

2 A It's has not atypical, especially given his prior social
3 environment.

4 Q Okay. Then, on the same page its says, another goal was,
5 independent living, "Youth possesses skills necessary to live
6 on his or her own." Right?

7 A Correct.

8 Q And in June of 1998, some progress. June of '99, it
9 says, "Earl has not yet acquired necessary skills needed for
10 successful in living." And in November, just before his
11 release, it says, "He's made some progress, but he does not
12 yet have all the skills necessary for successful independent
13 living."

14 Is that consistent or inconsistent with someone with
15 an intellectual disability, given the nature of the program
16 that he was being exposed to at that point in time?

17 A It is likely that he made progress. I just don't know
18 which of the skills that he was lacking, to which they're
19 referring.

20 Q But you do know the evaluation was that he lacked the
21 ability to live independently, despite their educational
22 efforts during that year or year and-a-half period that he was
23 in there?

24 A Correct.

25 Q Now, the other people that evaluated him, the first

B. Shapiro - Redirect/Burt

1 evaluation took place when he was six years old, right?

2 A Correct.

3 Q And do you remember at Elmhurst, in February or January
4 of 1989, he was admitted to that facility for behavioral
5 disturbance at school?

6 A Correct.

7 Q Okay. Do you recall that his aunt brought him in and
8 provided some history in the initial entry?

9 A Correct.

10 Q And this is nursing notes dated -- entry notes dated
11 January 25th, '89. It shows, "Presenting problems,
12 aggressive, compulsive, uncontrollable tantrums, poor
13 attention span, peer difficulties," and then under the section
14 about prior medical history, it says, "Has child been in
15 hospital before? When and where?" And the evaluator has
16 written in, "Denies previous hospitalization." Correct?

17 A Correct.

18 Q And you know from your review of the meningitis records
19 that that information is not correct?

20 A Correct.

21 Q And shortly after he was admitted, he was evaluated by a
22 resident by the name of Dupree, S. Dupree, correct?

23 A Yes.

24 Q And Dupree filled out a psychiatric evaluation, which is
25 at GOV 105, correct?

B. Shapiro - Redirect/Burt

1 A Correct.

2 Q And the second page of that evaluation, it's got medical
3 history, and what did he write down there?

4 A "None."

5 Q And we know that's incorrect information, correct?

6 A Correct.

7 Q Then he did a formal evaluation, right?

8 A Yes.

9 Q Very short evaluation reported by this resident, correct,
10 dated February 15th, 1989?

11 A This may not be the full evaluation. This is a letter
12 that arose from the evaluation, requesting a special education
13 placement.

14 Q You're right. The evaluation I just showed you was the
15 evaluation that was handwritten, correct?

16 A Right.

17 Q And the letter notes the detail that he's a black boy, a
18 six-year-old black boy, right?

19 A Yes.

20 Q The second paragraph there, but it doesn't know that
21 detail, because he didn't know it, that Mr. Wilson had been
22 diagnosed with meningitis?

23 A That's correct.

24 Q And what is the diagnosis that he reaches?

25 A He speaks to Oppositional Defiant Disorder and Academic

B. Shapiro - Redirect/Burt

1 Skills Disorder.

2 Q And does that diagnosis from that point on follow
3 Mr. Wilson through these Elmhurst records? Is that repeated
4 over and over and over again?

5 A Yes.

6 Q Was it significant that he didn't know of the meningitis
7 when he's looking at this six-year-old kid who's having
8 behavioral problems?

9 A Yes.

10 Q Why?

11 A Well, I think that the question when you see children who
12 you call Oppositional Defiant Disorder, means the child
13 doesn't do something and when they're asked, for example. And
14 the question always comes down to are they not doing it
15 because they're being willful or are they not doing it because
16 they're unable? And consequently, the need to distinguish
17 whether they're able or unwilling is really in my mind the key
18 thing that would make for a diagnosis of Oppositional Defiant
19 Disorder. I see many children who are called ODD,
20 Oppositional Defiant Disorder, who are intellectually limited.

21 MS. COHEN: Your Honor, I'm just going to object and
22 move to strike this. I mean, we asked and gone into this as
23 long as -- it seems on the prior objection. We've gone well
24 into the meningitis.

25 Now he's got the reason for the misdiagnosis he is

B. Shapiro - Redirect/Burt

1 now talking about is because of the meningitis, when
2 Dr. Shapiro's report says there's -- he couldn't determine the
3 causation from meningitis. So it's just, again, going down
4 further and further into this road, and so we object.

5 MR. BURT: Your Honor, I'm not sure I understand the
6 objection, that it's going down a road. I'm done with this
7 area, in any event, but I think the question is relevant for
8 the reasons I stated before, and when we talked about prior
9 diagnosis, and what information the clinician had when the
10 diagnosis was made.

11 THE COURT: I'll take it for what it's worth. I'll
12 take it for what it's worth. Go ahead.

13 MR. BURT: Thank you.

14 BY MR. BURT:

15 Q Now, the Court raised a question which I wanted to
16 address, which is how you can say that some of these scores
17 are reliable and other scores are not reliable. That's an
18 important question.

19 So first of all, you had some slides about that in
20 your presentation, correct?

21 A Correct.

22 Q Where you talk about the various sources of examiner or
23 score differences, when you see a pattern of scores and
24 differences. What could account for those differences? What
25 can cause unreliable scores? One of the things you talked

B. Shapiro - Redirect/Burt

1 about was examiner error?

2 A Correct.

3 Q Right. And what one of slides that I think you didn't

4 get a chance to talk about was the nature of those errors.

5 This is slide 51, where you talked about the literature on

6 this, right? Examiner errors on the Wechsler Scales?

7 A Yes.

8 Q And this is a study you quote, it says, one of the most

9 common errors that examiners make is assigning too much credit

10 to examining responses.

11 A Correct.

12 Q Correct? And that's because the nature of these tests

13 have specific questions that are asked, and answers are given.

14 The protocol calls for you to write the answers down and then

15 evaluate the answers?

16 A Correct.

17 Q Now, in all the tests you had to look at here, you only

18 had two where you actually had the testing booklets where the

19 answers were written down, where you can see what Mr. Wilson

20 said and whether the scoring was proper, correct?

21 A Correct.

22 Q And that was the Nagler examination, correct?

23 A (Peruses document.)

24 Q Which is at GOV 3954?

25 A Correct. I have that one.

B. Shapiro - Redirect/Burt

1 Q Okay. And the actual and -- luckily for that test, the
2 actual answers are -- were in your file and you were able to
3 retrieve those, right?

4 A (Peruses document.) Correct.

5 Q And so, if you look, for instance, at page 3955, this is
6 the actual part or part of the instrument that she
7 administered which is the WISC C, right?

8 A This is the comprehend subtest.

9 Q And comprehension, where that word says, you're asking --
10 giving the examinee a list of words and writing down the
11 responses and then you're using the scoring manual to decide
12 whether the score is a zero, a one or a two.

13 A The comprehension subtest is a subtest where a scenario
14 is asked. So for example, why do we have telephone books?
15 Why do we inspect meat? Those are the types of questions
16 that -- why do we have license plates? Those are the kinds of
17 questions that are asked on the comprehension subtest and then
18 the responses are recorded.

19 Q Okay. And in this case, since you have the testing
20 booklet, you can see what scores she gave him on the right,
21 two for the first, one, zero, one, one. That's how the scores
22 are derived, right?

23 A Correct.

24 Q And you can review that data and see whether she did it
25 correctly?

B. Shapiro - Redirect/Burt

1 A Correct.

2 Q And with the exception of the scoring error, which I
3 think you talked about, you determine that this test was done
4 correctly?

5 A There is a page missing. If you see on the previous page
6 to the subsequent page, it went from eight to ten. But it
7 looked as though that she was doing it correctly.

8 Q Okay. But the point is you at least have the booklet so
9 you can look at this?

10 A Correct.

11 Q And determine whether the score is reliable or whether
12 instead, you had the type of scoring errors that you talked
13 about in your PowerPoint, where the examiner is assigning too
14 much weight or credit to the response?

15 A Correct.

16 Q The only other testing booklet that you had was
17 Dr. Drob's testing booklet, correct?

18 A Correct.

19 Q And you reviewed that and evaluated it, determined that
20 it was done correctly?

21 A Correct.

22 Q Now, you also had -- after you wrote your report, you got
23 Dr. Denny's testing booklet, so you were able to look at that
24 raw data, correct?

25 A Correct.

B. Shapiro - Redirect/Burt

1 Q And as far as you could tell, that did he make any errors
2 in his scoring?

3 A No overt errors that I was able to determine.

4 Q And you were able to determine that because could you
5 review the testing booklet, look at the manual and see whether
6 he did it correctly?

7 A Correct.

8 Q Now, for all the other tests, you couldn't do that,
9 correct?

10 A Correct.

11 Q But there were some notes, for example, in the Pop
12 examination, what you had there were some notes indicating
13 what subtests he had done?

14 A Right. Dr. Pop prorated a number of the performance
15 subtests.

16 Q Although you didn't have the testing booklet, he at least
17 wrote down what subtests he gave and what tests he didn't
18 give?

19 A Correct.

20 Q So at least there, you're able to say, well, we know that
21 he didn't give the full battery, that he estimated the scores
22 for the ones that he didn't give somehow, and came up with a
23 score?

24 A Correct.

25 Q And the ones he didn't give are the very subtests that

B. Shapiro - Redirect/Burt

1 Mr. Wilson scored lower on when he was given those subtests by
2 other people?

3 A Correct.

4 Q For the other examiners, you couldn't even tell which
5 subtests they gave, correct?

6 A Often, that was the case.

7 Q For the Aranoff examination, she had some notes
8 indicating -- (peruses document.)

9 You didn't have in the Aranoff examination, you
10 didn't have the raw testing data. You had this entry, which
11 is 3934, indicating that she gave a WISC-3, and that the
12 testing was done on four separate days, correct?

13 A (Peruses document.) Correct.

14 Q And the dates were ten -- looks like 10-28-93, 11-5 and
15 looks like 11-6?

16 A It's 11-8.

17 Q Eleven-eight-93?

18 A And the first one was 10-27.

19 Q Although you didn't have the testing booklet from her,
20 you knew that she did the testing over the course of a number
21 of days, correct?

22 A Correct.

23 Q And you also knew from the protocol, the manual for that
24 test, that the way she did it by stretching it out over a
25 number of days was not in accord with the protocol for giving

B. Shapiro - Redirect/Burt

1 the test, correct? Isn't that true?

2 A If she did it over the four days, it was a violation of e
3 protocol.

4 Q And what does the protocol say when you're supposed to
5 give this?

6 MS. COHEN: Objection, Your Honor. I think we're
7 referring to the date seen. There is nothing on this page
8 that indicates the exact date of the test. So, I mean,
9 speculation as to whether the test was done given on one of
10 those or spread throughout all the days.

11 MR. BURT: Yeah. That's a good point.

12 BY MR. BURT:

13 Q The point is, you don't know whether these days refer to
14 whether she gave the test or what it refers to?

15 THE COURT: So you don't know if it violated the
16 protocol or not, is the point the government is making.

17 MR. BURT: Right.

18 THE COURT: So it's all speculation.

19 BY MR. BURT:

20 Q There is no way to tell whether she followed protocol in
21 the case, correct?

22 A Correct.

23 THE COURT: Is there a presumption of correctness or
24 incorrectness in these situations? Are these professionals or
25 not professionals? I'm sorry. You know, unless you have got

B. Shapiro - Redirect/Burt

1 more, if you tell me this person was drummed out of the
2 testing business, that would be one thing.

3 But, you know, why should the Court conclude or
4 presume that because you don't have this information, that the
5 testing was not done properly?

6 MR. BURT: (No response.)

7 THE COURT: Go on. Ask your next question.

8 BY MR. BURT:

9 Q At page 3939, do you see the entry that was made by her,
10 the handwriting at the bottom?

11 A (Peruses document.) Yes.

12 Q What does that say?

13 A You want the nurse's note or the psychologist's note?

14 Q No, I want the psychologist's note, Dr. Aranoff. If you
15 look at the next page, you'll see that she signed this note.

16 A Yes. It says, "Earl was tested psychologically on
17 October 27 and 28 and November 5th and 8th. Earl's
18 cooperation" --

19 Q That's all I want. So she is saying he was tested
20 psychologically on October 27th and 28, and November 5th and
21 6. Now, again, there's ambiguity there because you don't know
22 what test she gave on what date, correct?

23 A Correct.

24 Q If you had the booklet, you would be able to tell whether
25 she followed protocol or not?

B. Shapiro - Redirect/Burt

1 A Presumably.

2 Q So, what weight can you give a score like that, given
3 that you don't have raw data, given that there is a practice
4 effect issues which we talked about before?

5 A (No response.)

6 Q In terms of answering the Court's question about which of
7 these are reliable, which are not, what weight can you give to
8 this score?

9 A I think all you have are the numbers. You really have no
10 way of validating the numbers that she generated.

11 Q And in terms of the Court's question about, well, is
12 there a presumption of competency or not competency, I think
13 your slides address that, because you cited the literature,
14 which the studies say --

15 THE COURT: Why don't you let him answer the
16 question? I'm allowing you to lead somewhat, but basically,
17 you're testifying. He ought to be testifying. Let him
18 testify.

19 MR. BURT: Sure.

20 THE COURT: If he's got an answer, he can give it.
21 If he doesn't have an answer, let's move on. I don't really
22 want you to testify. I want him to testify.

23 BY MR. BURT:

24 Q What do the studies that are cited in your presentation
25 tell us about whether there is a presumption that errors are

B. Shapiro - Redirect/Burt

1 made or not made in these tests?

2 A What the studies that we put into the slide packet
3 suggest is that errors are very common in cognitive assessment
4 batteries, and that they run the range from violations of
5 protocol to simple addition errors, and errors in technique,
6 which may not necessarily be a violation of protocol, and then
7 the other one is the issue of interpretation, which we just
8 spoke of.

9 THE COURT: In the historical situation such as
10 this, where we're looking back, it's clear that the Supreme
11 Court was looking for a way to delineate and differentiate
12 normal intelligence from intelligence that was deficient. All
13 right? But precision is not is not really available to us.

14 Because of all the factors that you've been
15 discussing and Mr. Burt has brought out, that in the testing
16 process, there are -- there are situations which are not
17 equal. There are different testers use different techniques.
18 You can't go back and identify every technique and everything
19 that was said, in every testing situation.

20 So apart from the grossest kinds of disparities, how
21 much can a Court, do you think or you rely on these small
22 disparities in reaching a conclusion as to whether someone has
23 mental retardation or an intellectual disability? With your
24 experience, your years of experience, dealing with this, with
25 individuals in a clinical setting, as well as examining

B. Shapiro - Redirect/Burt

1 records, which is what you did here?

2 THE WITNESS: And I think I do a fair amount of
3 record examining, as well, but I think --

4 THE COURT: Speak into the microphone. I know
5 you're trying to look at me. Talk into the microphone.

6 THE WITNESS: Okay. I think that the question is an
7 extremely important one, because in the clinical setting, we
8 are permitted a little bit more wobble than we are in this
9 proceeding.

10 In the clinical setting, if I am off by a couple of
11 points, it isn't going to make that much difference,
12 particularly in the current era, because we no longer have --
13 from people with mild intellectual disability we do not have
14 segregated classes for them anyway. We're working on
15 inclusion, so if I decide --

16 THE COURT: Mainstreaming?

17 THE WITNESS: Mainstreaming.

18 THE COURT: As we describe it.

19 THE WITNESS: So that for me, as a clinician,
20 clearly, I want to be as accurate as I can, but there are
21 situations where it may be a point or two one way toward the
22 other that -- then we need to then say, oh, so what other
23 things does this particular child requires, and let's not get
24 so detailed in terms of the diagnosis.

25 The other thing that happens with children is that

B. Shapiro - Redirect/Burt

1 you can do another evaluation down the road to see -- and this
2 is where we were talking about some of the issues about the
3 practice effect and why they came up with the recommendation
4 for every year or every three years, depending on the age of
5 the child and every five years with adults, to be able to see
6 just how the person has been progressing.

7 So I think that the issue of the type of small
8 disparities that we have been talking about for the past
9 couple of days is important, but not the overwhelming thing
10 when we're talking about clinical care.

11 THE COURT: All right.

12 BY MR. BURT:

13 Q So in light of that, is the best, in your clinical
14 practice, because of what you just said, you can take the test
15 again three years down the line -- in this context, where
16 you're being asked to assess intellectual disability at a
17 specific point in time is the most reliable data point, the
18 one closest in time to whatever event it is you're anchored
19 to?

20 A And then because of the concerns that I have about the
21 minor disparities that the Judge brought up very nicely, I
22 think that I would advocate for using the 99th ninth
23 percentile competence limit as opposed to the 95th or the
24 90th, because the 95th competence limit around there, you
25 still have a five percent chance of being incorrect, in either

B. Shapiro - Redirect/Burt

1 direction, I might add -- but in terms of the discussion that
2 we're talking about for today, I would be much more concerned
3 about being too high than too low.

4 MR. BURT: Okay. That's all I have. Thank you,
5 Doctor.

6 THE COURT: Do you have the 99th competence limit
7 here, on this chart?

8 THE WITNESS: It's not on the chart, Your Honor.

9 THE COURT: Okay.

10 THE WITNESS: I was doing some --

11 THE COURT: Would you can you venture a conclusion
12 as to whether we have sufficient raw data to evaluate any of
13 these tests, apart from taking into account the practice
14 effects of subsequent testing after 1989, which was the first
15 test? If you take this to its -- your comment about the
16 practice effects --

17 THE WITNESS: Uh-hum (affirmative response).

18 THE COURT: -- on subsequent testing, are we left
19 only with the 1989 results, to be consistent?

20 THE WITNESS: I think that that would be one of
21 those disparities that you point to, that would need to kind
22 of be taken into account when you're saying that this is an
23 accurate reputation of this person's incapacities.

24 THE COURT: Thank you.

25 Do you have anything?

B. Shapiro - Redirect/Burt

1 MS. COHEN: Just a few questions, Your Honor.

2 THE COURT: Yes, just a few.

3 MS. COHEN: Just a few.

4 RECROSS-EXAMINATION

5 BY MS. COHEN:

6 Q Dr. Shapiro, you have just talked about -- you just asked
7 some questions about what you do in your clinical practice.

8 Do you recall that?

9 A Yes.

10 Q And you were called here to testify about the standard of
11 practice today, right?

12 A Yes.

13 Q In addition to actually -- withdrawn.

14 You were called here to render an opinion based on
15 science, right?

16 A And my clinical experience, yes.

17 Q And based on the standard practice, right?

18 A Right.

19 Q So in your standard of practice, you rely on
20 psychologists all the time, correct?

21 A Frequently.

22 Q And so you were called here to render an opinion on the
23 standard of practice and your opinion on what should be done
24 in an Atkins hearing is really not within your -- that's not
25 what you're here to render an opinion on, correct? In other

B. Shapiro - Recross/Cohen

1 words, you were just saying this a different kind of
2 proceeding, so things changed, right? You just said that?

3 A I said that is my opinion, that this should be a higher
4 standard because of letter vagaries of testing, to insure that
5 we're taking a correct -- making a correct decision.

6 Q Now, when you -- you also asked the question about
7 independent living from Brookwood. Do you recall that?

8 A Yes.

9 Q And Mr. Wilson indicated that when he was leaving
10 Brookwood, that he wasn't quite ready to live independently?

11 A Correct.

12 Q And you also aware that Mr. Wilson was 17 years old at
13 the time, correct?

14 A Correct.

15 Q And you also asked questions about what happened after
16 the cross-examination last night or -- sorry. You talked
17 about the fact that you went back to your hotel room and
18 looked at some issues, right?

19 A Correct.

20 Q And you said that you worked on these issues, right?

21 A Yes.

22 Q But it was Mr. Burt really that was working on the
23 issues, correct?

24 A I asked him to gather some data for me.

25 Q Right. In fact, he was the one that emailed Dr. Kaufman,

B. Shapiro - Recross/Cohen

1 correct?

2 A Correct.

3 Q And Dr. James is the psychologist who's also going to
4 testify for the defense in this case, correct?

5 A Correct.

6 (Continued on the next page.)

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B. Shapiro - Recross/Cohen

1 Q And it was her records that you relied upon, right?

2 A I used some of her data.

3 Q And you looked at the scores that she compiled, correct?

4 A Yes.

5 Q And originally you got the normative data from Dr. James,
6 right?

7 A Excuse me?

8 Q The normative data for the Flynn effect, you got them
9 from Dr. James, right?

10 A Yes.

11 Q And you testified in the Davis case with Dr. James as
12 well, correct?

13 A Again, she testified and I testified. We didn't testify
14 together.

15 Q You were in the same proceeding?

16 A Well, we were on the same playing level. I didn't meet
17 her at that proceeding.

18 Q But you looked at her report, correct?

19 A Yes.

20 Q And in her report at that time in the Davis case, she
21 used for the WAIS-III the 1997 normative data and not the 1999
22 normative data. In fact, I have her report here if you'd like
23 to see it to refresh your recollection?

24 A Can you repeat the question?

25 Q Sure. The Davis -- in the Davis case, Dr. James used the

B. Shapiro - Recross/Cohen

1 normative date for the WAIS-III as 1997. And you used it in
2 1995. You're saying it's 1995, correct?

3 A That's correct.

4 Q Okay.

5 A From one of the people who participated in the
6 standardization of that instrument.

7 Q But yesterday when I showed you the actual instruments
8 with the normative copyright date, you agreed with me,
9 correct?

10 A At that point in time I needed to do the research to
11 verify. And it bothered me, which is why I went back to look
12 at it, because I didn't understand precisely what you were --
13 what was -- how that was -- what that was defining. But the
14 answer to your question specifically is yes.

15 Q Yes. And Dr. James who's highly regarded used 1997 in
16 the Davis case, right?

17 A Correct.

18 MR. BURT: I'm going to object to 403 at this point.
19 She's trying to impeach him with another expert's opinion that
20 he didn't rely upon. I don't think it's helpful.

21 MS. COHEN: Your Honor, he relied upon it in the
22 Davis case.

23 MR. BURT: There's no foundation for that.

24 MS. COHEN: I can lay the foundation. But I can
25 make another question which gets really to the point.

B. Shapiro - Recross/Cohen

1 THE COURT: All right. Ask your other question.

2 BY MS. COHEN

3 Q Dr. Shapiro, there are a lot of -- there's a lot of
4 disagreement on this point, correct?

5 A I'm sorry?

6 Q There was a lot of disagreement here on this point?

7 A On which point?

8 Q On the normative data, correct?

9 A I don't think so anymore after reviewing Dr. Flynn's
10 article since he was the one that defined the effect and he
11 defined the nomadization and used the data that was based on
12 that to develop his principle. If he was off by two years in
13 that development then there would've been a systematic error
14 that would've accounted for a greater change than he reported.

15 Q You would agree that something so important like this,
16 there should be one general standard, right?

17 A Yes.

18 MS. COHEN: Nothing further, your Honor.

19 THE COURT: Anything else?

20 MR. BURT: No, your Honor. Thank you.

21 THE COURT: All right. The witness is excused. You
22 may stand down, sir.

23 THE WITNESS: Thank you, sir.

24 THE COURT: You're very welcome. Have a good
25 evening.

B. Shapiro - Recross/Cohen

1 Now, the materials that are over here, I'm just
2 worried someone is going to trip on them actually. Are you
3 providing them to the witnesses?

4 MR. BURT: Yes. They're there because all the
5 witnesses relied on that same group of documents, but I can
6 certainly move them or put them wherever the court wants them.

7 THE COURT: Well, why don't you put them along the
8 wall where the chairs are now, we'll move the chairs. I worry
9 that a witness is going to trip over them. We have enough
10 trouble with wires. We don't need trouble with books. I
11 don't want anyone to get hurt in the process. After we
12 finish, whatever you can do to sort of straighten that out.

13 MR. BURT: Sure.

14 THE COURT: What are we doing tomorrow morning?

15 MR. BURT: We have Dr. Olley and the full day pretty
16 much with other witnesses.

17 THE COURT: All right. And who are the other
18 witnesses for tomorrow? How long is Dr. Olley going to be on
19 direct?

20 MR. BURT: I anticipated in the witness scheduling
21 four hours. I don't think it's going to be that long. That
22 was a maximum. And so I think it will be three, three and a
23 half. Then we have Dr. Drob after Dr. Olley. He's the one
24 that did the IQ testing in 2003.

25 THE COURT: Right.

B. Shapiro - Recross/Cohen

1 MR. BURT: Then we have Mr. Giglio who was the
2 evaluator, I think, in '97.

3 THE COURT: All of that tomorrow?

4 MR. BURT: Yes. They'll be here. I'm not sure how
5 far we'll get given how we've been going, but they'll be lined
6 up. And we have Ms. Cook who is a lay witness that we need to
7 get on tomorrow at some point because of her work schedule.

8 THE COURT: How long will she be on direct?

9 MR. BURT: She will probably be less than an hour.

10 THE COURT: And so about how much cross do you think
11 you have for Dr. Olley? Because we can do Ms. Cook after
12 Ms. Dr. Olley if we get done with Dr. Olley. I don't want to
13 break up Dr. Olley.

14 MR. McGOVERN: I don't think Dr. Olley should be
15 broken up either. We're going to have substantial cross for
16 Dr. Olley. Dr. Olley is probably the central witness that
17 they have for this proposition. And so we view her as an
18 important witness that has --

19 MR. BURT: We can start with Ms. Cook.

20 MR. McGOVERN: There's a lot of material that I
21 expect would be relevant to the court's determination that Dr.
22 Olley is going to opine on that the government has to have the
23 opportunity to address the veracity of.

24 THE COURT: We'll start with Dr. Olley and then
25 we'll go to Ms. Cook. Anything else for tonight?

B. Shapiro - Recross/Cohen

1 MR. McGOVERN: No, your Honor. Thank you.

2 MR. BURT: No, your Honor.

3 THE COURT: Thank you very much. Have a good
4 evening. See you tomorrow morning at 9:00 a.m.

5

6 (Whereupon, the matter was adjourned to November 28, 2012 at
7 9:00 a.m.)

8

9 CERTIFICATE OF REPORTER.

10 I certify that the foregoing is a correct transcript of the
11 record of proceedings in the above-entitled matter.

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14 _____
Judi Johnson, RPR, CRR, CLR
15 Official Court Reporter

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JUDI JOHNSON, RPR, CRR, CLR
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B. Shapiro - Recross/Cohen

I N D E X

WITNESSES:**PAGE**

Cross/Cohen	223
Redirect/Burt	338
Recross/Cohen	419

DEFENDANT'S EXHIBITS MARKED IN EVIDENCE

C-1 to C-6	221
D	354
E	357

GOVERNMENT'S EXHIBITS MARKED IN EVIDENCE

1	230
39	233
2	238
2A	241
3	244
4	246
5	251
7	253
44	259
10	271
10A	276
6	284
51	313
15	317
16	319
37	327

\$	2002 [2] 314/6 314/7	5772 [1] 283/22	232/12 235/15 235/16 235/17
\$338 [1] 323/6	2005 [8] 304/13 304/13 305/1	58 [1] 405/9	233/18 236/23 237/8 238/12 239/3
'	314/7 363/22 363/24 365/2	5856 [1] 243/20	241/23 241/25 242/5 242/12
'89 [1] 403/11	425/24	5913 [2] 316/23 316/24	242/12 246/15 247/6 247/23
'93 [1] 369/23	2005 [1] 357/11	5:30 [1] 222/8	248/8 251/8 253/1 253/2 257/6
'94 [1] 369/23	2006 [6] 290/13 302/25 352/19	5th [2] 413/17 413/20	257/15 257/18 257/21 258/4
'97 [1] 426/2	353/14 357/11 360/6	6	258/15 259/23 261/9 262/18
'99 [2] 401/23 402/8	2010 [1] 357/12	613-2480 [1] 219/19	262/21 267/1 267/9 269/3 269/10
-	2011 [3] 271/4 273/5 363/21	613-2582 [1] 219/19	269/15 270/4 270/4 270/6 274/6
-----x	2012 [12] 218/8 253/25 260/12	6132 [1] 327/14	274/22 274/23 274/24 275/17
218/2 218/7	260/13 264/15 264/16 297/17	69 [1] 344/3	276/25 278/3 285/14 288/13
0	332/9 363/21 399/16 399/20	7	290/1 290/21 290/21 292/7
0030 [1] 310/21	2427/6	7,000 [1] 225/12	293/13 293/15 294/11 296/12
04-CR-1016 [2] 218/3 220/8	23 [1] 359/20	70610 [1] 250/21	297/16 300/4 300/23 302/19
0Dr. Ollie [1] 293/24	2480 [1] 219/19	718 [2] 219/19 219/19	305/19 307/1 309/1 309/4 309/15
1	2582 [1] 219/19	7th [1] 332/9	311/17 312/23 315/21 316/6
10 [7] 270/17 270/18 270/24	25th [1] 403/11	8	318/3 318/24 319/24 320/3
271/1 276/9 369/6 428/20	2690 [3] 276/8 276/8 276/14	80 [2] 370/7 371/22	320/23 323/24 325/17 326/3
10,000 [1] 375/17	27 [4] 218/8 376/16 411/18	84 [1] 367/1	328/3 329/8 329/10 329/11
10-27 [1] 411/18	413/17	85 [1] 340/15	329/12 330/3 331/3 331/14 333/6
10-28-93 [1] 411/14	271 [1] 218/15	87 [1] 373/25	333/9 333/12 334/9 334/21
10-minute [1] 256/13	2736 [1] 240/14	8th [2] 219/7 413/17	335/19 335/22 336/5 336/7 336/7
100 [1] 218/21	27th [1] 413/20	9	336/16 337/2 337/19 338/20
1000 [1] 219/2	28 [3] 413/17 413/20 427/6	90 [1] 369/24	340/9 341/3 341/15 341/21
10013 [2] 218/21 219/7	292 [1] 360/22	90th [1] 417/24	341/21 341/25 343/2 344/5 344/9
1016 [2] 218/3 220/8	2:10 [1] 327/2	91 [1] 327/13	346/3 346/6 346/15 351/13
102 [1] 359/25	2A [6] 240/17 240/22 241/8	93 [5] 369/24 370/7 371/21	351/16 355/20 356/2 356/20
105 [1] 403/25	241/15 241/17 428/17	411/14 411/17	357/17 358/10 358/14 360/5
10A [6] 276/13 276/13 276/14	2nd [1] 290/13	94103 [1] 219/2	361/18 363/3 363/7 364/3 364/10
276/18 276/20 428/21	3	95th [2] 417/23 417/24	364/23 368/1 368/10 369/19
11 [3] 276/12 395/16 396/11	30 [3] 261/10 261/11 261/12	97 [3] 341/22 341/22 350/12	370/12 372/24 373/6 375/12
11-5 [1] 411/14	3005 [1] 267/15	99 [1] 219/7	377/23 378/7 379/17 379/22
11-6 [1] 411/15	3227 [1] 245/23	99th [2] 417/22 418/6	379/25 380/5 380/19 381/6
11-8 [1] 411/16	3235 [1] 310/24	9:00 [3] 218/9 427/4 427/7	381/12 381/18 383/7 383/23
11201 [2] 218/5 218/16	3302 [1] 229/1	9:30 [1] 221/19	384/11 384/12 385/8 385/9
1149 [1] 232/15	338 [1] 428/3	A	385/20 386/20 386/21 387/3
11th [1] 349/15	3478 [1] 401/13	a.m [3] 218/9 427/4 427/7	387/7 388/14 389/6 390/14
14 [6] 346/5 383/11 395/15	37 [5] 327/15 327/16 327/18	AAIDD [9] 278/3 278/8 278/14	390/16 391/3 392/2 394/5 394/8
396/11 399/19 400/3	327/20 428/23	342/9 352/1 357/12 364/11 365/7	397/24 399/7 400/21 401/5
14th [1] 264/14	39 [5] 232/16 232/20 232/25	366/13	401/16 403/14 406/1 406/8
15 [11] 300/14 316/2 317/1	233/2 428/16	abbreviated [1] 374/1	406/19 406/22 407/1 407/4 407/5
317/3 317/5 317/7 320/22 322/19	3934 [1] 411/11	abbreviations [1] 233/24	409/3 409/13 414/4 414/6 414/11
326/3 344/5 428/22	3939 [1] 413/9	abilities [12] 286/13 287/17	414/25 417/2 417/2 417/8 417/10
15th [1] 404/10	3954 [1] 407/24	318/11 358/19 371/9 397/6 397/9	417/20 418/2 418/3 418/15 419/6
16 [5] 319/6 319/7 319/9 319/11	3955 [1] 408/5	397/13 397/15 397/20 398/4	419/7 419/10 420/6 420/15
428/23	3980 [3] 395/15 395/22 395/23	399/13	420/17 426/10
17 [2] 346/5 420/12	3981 [1] 396/17	ability [21] 226/8 248/11 248/15	above [6] 230/12 272/5 284/17
18 [7] 298/16 338/18 359/1	3rd [2] 260/11 260/13	249/22 249/25 269/10 276/23	289/13 398/23 427/11
359/2 359/2 374/17 379/24	4	284/8 286/2 286/7 286/19 286/19	above-entitled [1] 427/11
19 [5] 249/5 249/5 314/4 331/6	400 [1] 219/2	293/19 337/20 344/8 358/19	absent [1] 286/21
331/7	403 [2] 255/13 423/18	369/13 390/17 397/4 398/3	absolute [2] 286/12 286/16
1972 [1] 366/8	41 [3] 302/10 304/6 304/10	402/21	absolutely [5] 287/6 287/22
1984 [2] 376/17 377/6	42 [3] 302/10 304/6 305/16	able [44] 222/8 224/5 224/22	299/5 299/16 392/15
1989 [10] 353/22 355/3 357/9	43 [3] 302/10 304/5 304/6	224/23 224/25 225/22 225/24	abstract [21] 227/15 227/17
357/21 366/4 367/5 403/4 404/10	44 [6] 258/19 259/3 259/8 304/5	226/1 226/2 226/8 227/10 228/19	227/18 228/3 228/3 228/4 228/11
418/14 418/19	351/16 428/20	232/5 237/9 237/13 237/22	238/3 250/15 253/8 255/16
1991 [2] 357/14 368/7	45 [1] 257/18	237/23 270/7 275/12 281/13	266/17 275/17 284/8 284/24
1992 [1] 313/24	497 [1] 237/4	281/25 286/11 287/10 287/17	286/3 286/13 286/19 286/19
1995 [7] 352/4 353/21 355/6	5	289/22 290/4 308/17 308/20	286/22 396/15
357/10 357/21 423/2 423/2	5-6 [2] 253/25 254/3	317/23 317/25 320/24 323/1	abstractly [2] 228/21 337/21
1997 [6] 352/5 357/14 394/23	5-6-2012 [1] 253/25	325/1 329/15 385/4 395/5 405/17	academic [4] 343/7 344/10 400/1
422/21 423/1 423/15	50 [9] 255/2 260/7 260/8 264/11	408/2 409/23 410/3 410/4 410/20	404/25
1998 [3] 314/4 401/21 402/8	332/7	413/24 417/5	academic-type [1] 400/1
1999 [3] 314/5 401/10 422/21	501 [1] 218/21	abnormally [1] 382/14	academically [1] 343/9
2	51 [5] 313/9 313/17 313/19	abortion [3] 291/22 292/9	academics [3] 249/1 400/1
20 [2] 249/5 377/8	407/5 428/22	292/25	401/23
2000 [1] 314/5	5180 [2] 253/15 253/16	about [208] 221/14 221/23 223/7	accept [3] 268/15 290/5 297/8
2001 [1] 314/6	57 [1] 365/2	223/15 224/25 225/1 225/2 225/4	acceptable [1] 222/7
	5702 [2] 270/15 276/10	228/3 230/9 230/19 231/18	accepted [2] 329/13 329/22
			access [1] 240/1
			accident [1] 248/9
			accord [1] 411/25
			according [1] 386/1

<p> account [10] 286/24 287/14 287/21 297/22 312/24 361/7 367/11 406/24 418/13 418/22 accounted [1] 424/14 accounts [1] 399/18 accuracy [1] 368/1 accurate [3] 356/20 416/20 418/23 achieve [1] 343/19 achievement [2] 343/15 343/17 acid [1] 221/18 acquaintances [3] 279/18 295/1 295/11 acquired [1] 402/9 across [3] 277/19 277/21 282/25 act [1] 281/15 activity [3] 325/7 325/9 377/19 actual [10] 234/21 306/11 343/16 358/6 390/24 400/7 408/1 408/2 408/6 423/7 actually [36] 221/2 227/3 232/4 233/6 241/20 248/20 258/8 263/6 263/12 267/13 274/15 275/4 276/13 294/8 298/18 301/3 301/3 302/24 305/17 311/13 315/19 316/1 320/9 323/24 331/6 332/10 335/3 357/23 375/21 375/25 379/18 395/16 396/3 407/18 419/13 425/2 acuity [1] 390/15 ad [1] 231/23 adaptive [27] 225/15 247/22 247/25 248/5 248/7 268/18 269/10 278/4 281/4 286/16 287/2 287/5 293/19 293/22 294/4 294/10 296/18 328/11 330/18 330/19 333/7 338/14 340/4 340/11 341/8 360/5 380/19 adaptive-behavior [2] 340/11 341/8 adaptive-functioning [2] 330/18 333/7 add [2] 372/18 418/1 adding [1] 373/1 addition [6] 248/6 287/21 346/13 355/13 415/5 419/13 additional [4] 241/1 296/4 296/11 346/1 additions [2] 365/15 365/16 address [9] 252/2 268/12 345/12 347/11 347/25 348/1 406/16 414/13 426/23 addressing [3] 346/8 348/21 387/8 adequate [1] 300/25 adequately [2] 300/7 300/12 ADHD [3] 350/20 387/10 387/16 adjourned [1] 427/6 adjusting [1] 361/6 administer [2] 339/9 339/9 administered [5] 366/3 366/5 372/12 385/9 408/7 administration [2] 381/25 382/1 administrators [1] 375/13 admissibility [1] 376/3 admission [2] 281/21 300/10 admitted [9] 282/6 288/8 303/12 327/14 376/17 380/24 383/3 403/4 403/21 admonish [1] 366/11 adult [4] 272/25 273/1 388/19 </p>	<p> 388/19 adult [4] 250/9 361/13 383/15 417/5 advance [1] 399/20 Adventure [1] 305/17 advice [5] 289/18 290/22 291/11 292/9 308/6 advocacy [1] 364/11 advocate [1] 417/22 advocating [1] 337/1 affect [5] 294/3 299/24 363/13 370/24 376/2 affecting [1] 371/19 affirmative [2] 300/15 418/17 affirmatively [4] 314/3 314/19 314/21 319/2 afford [1] 269/19 after [26] 223/13 228/19 235/12 298/15 307/16 315/9 322/21 322/22 329/13 332/10 332/12 332/18 344/2 363/24 367/23 371/1 385/17 400/10 403/21 409/22 418/14 420/15 424/9 425/11 425/23 426/11 afternoon [2] 257/25 349/16 afterwards [1] 221/1 again [45] 237/2 248/14 260/23 261/17 261/20 261/23 263/11 265/1 267/3 269/3 271/24 271/24 274/25 276/22 277/15 282/13 284/7 285/4 289/21 290/10 292/13 295/15 305/18 306/21 306/22 314/4 315/25 320/2 320/5 322/4 322/17 323/19 324/24 334/16 346/11 365/5 372/4 383/18 383/19 385/7 405/4 406/3 413/21 417/15 422/13 against [3] 220/9 255/25 382/10 age [42] 263/15 263/19 263/24 264/4 275/15 275/21 281/13 298/16 298/17 299/23 300/1 313/23 316/7 318/12 318/13 320/22 320/23 321/12 322/19 344/5 352/2 365/21 365/23 368/12 369/6 369/11 369/11 369/11 374/17 377/11 379/23 379/24 382/10 383/3 383/7 383/11 383/11 385/13 387/21 400/3 413/15 417/4 aged [2] 262/8 264/1 AGENT [2] 219/12 220/14 ages [1] 264/4 aggressive [1] 403/12 aging [1] 365/23 ago [2] 240/9 377/25 agoraphobic [1] 287/19 agree [12] 258/17 264/3 288/20 296/9 299/11 304/22 305/8 312/9 321/15 351/5 362/14 424/15 agreed [4] 351/21 354/15 373/19 423/8 agreeing [1] 288/21 agreement [1] 329/14 agreements [1] 329/5 ahead [21] 230/5 236/9 238/18 256/10 260/15 261/5 264/17 265/18 275/4 302/13 304/20 306/13 349/18 356/17 376/7 381/12 382/4 382/7 384/9 386/15 406/12 AIDD [1] 278/3 aided [1] 219/21 ain't [1] 268/10 </p>	<p> Alan [1] 355/17 alive [2] 239/1 239/23 all [139] 220/3 220/20 221/23 222/22 229/24 230/6 231/22 232/20 234/10 235/13 240/20 240/25 241/12 241/25 242/25 244/16 244/25 245/4 245/7 245/8 248/11 250/25 251/17 251/24 254/19 254/20 255/7 255/20 257/1 257/4 257/10 258/5 258/10 258/11 258/23 259/3 259/13 259/17 260/6 260/8 261/11 261/13 264/8 264/17 265/15 265/18 268/5 268/16 269/24 270/18 271/22 272/23 274/7 274/8 276/18 278/18 280/24 284/10 284/11 284/14 285/15 285/15 286/6 289/20 292/4 294/16 298/8 301/22 302/13 304/2 306/20 310/11 311/3 311/17 311/23 313/17 319/7 326/4 326/7 330/16 332/4 333/6 337/10 337/10 337/18 338/22 339/22 341/3 344/2 345/14 346/8 346/11 347/20 351/9 354/5 354/10 354/18 354/21 357/1 370/15 371/1 371/16 373/11 374/16 376/4 379/10 380/15 380/25 381/19 382/5 383/25 386/9 386/10 388/23 392/4 393/4 393/6 393/12 393/18 397/2 398/11 402/12 406/19 407/17 410/8 412/10 412/18 413/19 414/9 415/12 415/14 417/11 418/4 419/20 424/1 424/21 425/4 425/17 426/3 alley [1] 349/8 allow [2] 268/14 365/18 allowed [2] 324/21 348/5 allowing [1] 414/16 almost [5] 261/3 292/20 338/6 342/7 367/20 alone [2] 343/20 347/17 along [7] 229/9 233/12 285/24 289/21 297/14 361/16 425/7 already [16] 267/5 267/17 276/10 279/20 302/9 303/1 303/4 310/20 313/7 324/6 354/15 357/18 364/16 380/24 385/19 388/5 also [51] 219/11 225/15 226/16 228/7 229/10 237/8 239/25 248/7 249/1 249/12 249/20 254/15 264/11 273/24 276/23 279/24 281/2 282/7 282/11 282/18 296/9 301/7 308/6 313/5 314/10 315/21 318/14 322/8 323/16 324/2 328/22 336/14 339/17 340/25 341/8 350/4 350/4 357/12 358/14 361/18 369/3 369/16 369/19 382/24 385/4 409/22 411/23 420/6 420/12 420/15 421/3 although [5] 235/23 273/13 363/12 410/16 411/19 always [5] 246/14 284/25 299/3 372/3 405/14 am [3] 254/18 349/8 416/10 ambiguity [1] 413/21 AMERICA [3] 218/2 220/8 220/12 American [1] 366/15 amount [4] 308/17 317/25 </p>	<p> 386/25 416/2 analytical [2] 243/9 243/12 anchored [1] 417/18 and-a-half [2] 399/19 402/22 and/or [1] 248/15 angle [1] 305/23 angry [4] 277/5 277/21 282/25 283/11 another [51] 225/2 227/5 227/9 227/11 228/4 231/18 232/12 237/7 240/8 240/9 243/1 243/17 245/22 247/20 249/22 253/13 263/2 266/25 272/8 272/25 277/25 278/21 280/9 281/10 281/21 289/3 289/18 289/20 290/8 291/23 294/16 298/8 301/5 301/6 307/15 308/18 316/6 317/1 317/21 322/1 332/11 344/25 345/20 346/14 382/1 390/22 392/1 402/4 417/1 423/19 423/25 answer [38] 224/23 233/9 272/16 282/23 282/23 283/1 283/2 283/5 283/8 283/9 283/14 283/17 283/18 283/18 283/19 285/5 286/11 287/7 288/12 293/12 296/13 314/24 329/22 342/17 353/11 357/6 357/8 376/6 378/9 378/17 379/14 384/13 389/1 400/18 414/15 414/20 414/21 423/14 answered [3] 261/14 276/5 385/19 answering [2] 337/11 414/6 answers [8] 244/8 382/2 395/19 407/13 407/14 407/15 407/19 408/2 anticipated [1] 425/20 anxiety [1] 342/6 any [60] 221/4 221/5 232/23 234/2 238/13 241/13 242/1 243/23 246/2 255/5 256/1 256/7 260/9 262/18 262/21 267/13 267/19 268/14 270/18 274/21 276/15 276/16 283/6 283/25 287/15 287/22 298/23 300/8 302/16 308/24 311/13 312/23 313/15 314/17 316/21 317/3 318/15 318/16 319/7 323/9 327/16 348/9 355/19 358/18 358/24 372/9 373/3 374/19 374/19 375/14 380/18 382/2 384/21 388/21 388/23 388/23 390/10 406/7 410/1 418/12 anybody [6] 243/7 243/8 286/9 300/18 315/10 392/14 anymore [2] 277/4 424/9 anyone [3] 223/6 234/20 425/11 anything [21] 221/18 232/15 303/13 304/13 337/2 338/6 340/9 341/3 342/7 355/8 378/12 381/7 382/11 382/18 385/23 390/1 390/6 390/14 418/25 424/19 426/25 anyway [1] 416/14 apart [3] 368/9 415/20 418/13 apartment [2] 299/20 299/22 apologize [2] 240/17 384/5 apparently [2] 275/2 401/17 appear [3] 223/22 230/9 267/13 appearance [2] 226/13 301/10 appearances [1] 220/10 appeared [3] 300/11 300/24 </p>
---	---	--	---

<p>B</p> <p>Bates... [9] 270/14 276/8 282/21</p> <p>283/22 302/9 316/24 317/21</p> <p>327/13 327/14</p> <p>Bates-numbered [2] 327/13</p> <p>327/14</p> <p>batteries [1] 415/4</p> <p>battery [6] 364/8 395/4 396/25</p> <p>399/6 399/8 410/21</p> <p>be [208] 220/19 221/24 222/8</p> <p>222/14 222/16 223/20 223/22</p> <p>224/5 224/22 224/23 224/25</p> <p>225/24 225/24 226/1 226/2 226/8</p> <p>227/6 227/10 227/12 227/16</p> <p>227/19 228/10 228/19 230/15</p> <p>230/24 231/8 231/15 231/23</p> <p>232/2 233/16 234/22 235/6 235/8</p> <p>236/4 236/17 237/9 237/13</p> <p>237/20 237/22 237/23 238/1</p> <p>239/16 239/19 240/6 241/25</p> <p>242/19 243/5 245/7 245/12</p> <p>246/17 247/10 247/18 249/24</p> <p>250/4 251/8 252/3 252/3 252/25</p> <p>253/8 253/9 253/10 255/2 255/12</p> <p>255/25 256/3 256/7 261/2 262/8</p> <p>262/11 268/6 268/23 270/16</p> <p>271/19 272/6 274/7 274/18</p> <p>277/15 279/6 280/2 281/13 282/5</p> <p>282/18 284/25 285/8 286/11</p> <p>287/17 287/18 289/22 290/3</p> <p>290/9 290/25 291/22 292/17</p> <p>293/12 296/3 297/18 299/6 300/2</p> <p>300/18 302/17 303/6 303/14</p> <p>304/8 308/17 308/20 309/12</p> <p>310/7 312/24 314/15 314/16</p> <p>317/25 320/15 320/25 321/15</p> <p>322/25 322/25 323/1 323/1</p> <p>323/15 325/1 325/1 325/8 325/9</p> <p>327/3 329/5 329/11 329/12</p> <p>329/15 331/25 337/4 337/5 337/7</p> <p>340/25 342/11 343/24 344/6</p> <p>344/14 344/14 345/8 346/7</p> <p>346/24 347/6 347/23 348/5 348/9</p> <p>348/20 349/14 350/15 357/16</p> <p>357/19 360/15 362/3 362/9</p> <p>363/10 363/16 365/13 372/15</p> <p>373/13 374/1 374/12 374/15</p> <p>375/8 377/3 379/8 382/15 385/21</p> <p>386/11 386/16 386/17 386/25</p> <p>387/1 387/2 387/2 387/8 387/9</p> <p>387/16 388/16 390/10 393/11</p> <p>395/5 396/13 397/11 399/6 401/7</p> <p>404/11 413/2 413/24 414/17</p> <p>415/6 416/20 416/21 417/5 418/2</p> <p>418/19 418/20 418/22 419/23</p> <p>420/3 424/16 425/18 425/21</p> <p>425/22 426/4 426/5 426/8 426/9</p> <p>426/14 426/21</p> <p>because [144] 221/22 223/19</p> <p>223/23 224/6 224/19 226/16</p> <p>227/4 228/14 230/15 231/8 232/8</p> <p>232/18 233/10 233/16 235/7</p> <p>235/12 236/16 239/19 245/13</p> <p>245/15 247/1 247/9 247/23</p> <p>248/11 249/7 250/1 250/14 253/5</p> <p>254/7 255/15 255/22 258/7 263/9</p> <p>268/7 269/18 271/14 271/19</p> <p>271/23 272/4 272/6 272/14</p> <p>272/16 273/3 274/12 274/16</p> <p>274/17 275/5 277/16 280/18</p> <p>281/6 283/3 283/5 284/13 284/17</p> <p>287/6 287/14 288/1 288/25</p>	<p>289/14 289/25 292/24 293/13</p> <p>294/22 295/14 295/2 300/20</p> <p>309/11 310/11 311/12 311/18</p> <p>311/20 315/3 315/12 318/7 318/9</p> <p>320/6 320/10 320/20 322/18</p> <p>329/15 331/23 333/6 341/6</p> <p>344/13 344/16 345/20 346/2</p> <p>347/5 347/12 347/25 348/3</p> <p>348/13 348/14 349/12 350/4</p> <p>351/1 351/8 351/23 352/14 356/1</p> <p>361/12 363/15 364/2 367/11</p> <p>368/18 369/13 372/15 375/2</p> <p>375/21 378/5 378/16 379/8</p> <p>381/19 384/18 385/2 385/5</p> <p>385/16 390/18 394/5 395/3</p> <p>396/18 398/23 399/5 399/7</p> <p>404/21 405/15 405/15 406/1</p> <p>407/12 410/4 413/4 413/21</p> <p>414/13 415/14 416/7 416/12</p> <p>417/14 417/20 417/24 420/4</p> <p>423/12 425/4 426/7 426/11</p> <p>become [2] 251/23 327/24</p> <p>bed [3] 321/12 321/15 386/14</p> <p>been [52] 223/9 233/14 237/3</p> <p>237/4 238/7 239/24 240/20</p> <p>243/20 245/23 250/21 251/17</p> <p>254/18 254/20 254/24 258/12</p> <p>275/3 283/22 284/14 293/23</p> <p>304/25 314/11 317/23 320/7</p> <p>324/7 324/11 327/14 327/22</p> <p>333/6 333/9 333/9 343/12 347/21</p> <p>348/23 356/9 358/15 364/20</p> <p>366/7 372/22 375/14 380/14</p> <p>380/25 382/17 385/23 393/23</p> <p>394/12 403/14 404/21 415/14</p> <p>417/6 417/8 424/13 426/5</p> <p>before [38] 218/11 228/23 230/5</p> <p>233/6 236/3 239/9 259/23 263/5</p> <p>264/8 265/10 272/1 273/10 287/4</p> <p>296/15 296/19 298/20 300/4</p> <p>300/24 312/23 316/2 321/20</p> <p>324/12 331/22 331/25 338/18</p> <p>339/10 349/15 364/3 379/23</p> <p>379/24 382/18 385/24 401/10</p> <p>401/15 402/10 403/15 406/8</p> <p>414/4</p> <p>beforehand [1] 301/21</p> <p>began [2] 331/7 334/17</p> <p>beginning [3] 222/5 284/9</p> <p>376/15</p> <p>begins [2] 362/18 362/24</p> <p>behavior [34] 227/6 247/25</p> <p>255/11 280/6 282/11 282/14</p> <p>282/16 286/17 287/2 287/5 287/9</p> <p>287/11 287/13 295/16 295/16</p> <p>295/17 296/19 328/12 338/14</p> <p>339/7 340/4 340/11 341/8 348/15</p> <p>359/1 359/7 360/4 360/4 360/5</p> <p>375/3 383/12 386/6 394/5 394/9</p> <p>behavioral [5] 228/20 342/25</p> <p>398/22 403/4 405/8</p> <p>behaviors [2] 300/4 337/10</p> <p>behind [1] 257/18</p> <p>being [49] 221/15 224/3 225/22</p> <p>232/5 234/3 234/4 242/19 242/20</p> <p>242/21 242/21 242/23 248/7</p> <p>251/25 251/25 269/12 270/5</p> <p>270/7 270/8 272/18 275/12 277/7</p> <p>281/25 282/6 287/10 289/17</p> <p>291/12 316/25 320/24 323/6</p> <p>328/8 328/16 333/21 333/21</p> <p>336/18 347/5 349/4 371/14 379/6</p> <p>380/17 383/11 388/22 392/1</p>	<p>398/14 399/19 402/16 405/15</p> <p>410/7 409/15 418/8</p> <p>being's [1] 291/23</p> <p>believe [12] 221/4 261/3 290/11</p> <p>298/19 337/5 337/15 338/10</p> <p>338/13 338/17 373/15 374/25</p> <p>383/10</p> <p>believed [2] 297/17 331/25</p> <p>believing [1] 378/11</p> <p>belong [2] 280/3 280/7</p> <p>below [2] 277/2 397/16</p> <p>bench [2] 220/6 327/1</p> <p>beneath [1] 240/6</p> <p>Bernetta [1] 272/6</p> <p>besides [1] 357/18</p> <p>best [15] 222/18 234/6 246/11</p> <p>287/12 318/2 318/2 319/14</p> <p>319/15 320/4 320/11 365/14</p> <p>368/20 368/25 371/4 417/13</p> <p>better [10] 242/3 264/4 264/5</p> <p>271/14 272/20 277/9 285/1 306/4</p> <p>306/5 399/20</p> <p>between [16] 226/6 233/24</p> <p>244/10 260/1 272/15 297/24</p> <p>328/8 342/14 343/14 344/7 356/2</p> <p>358/2 367/15 369/23 382/21</p> <p>388/10</p> <p>beyond [5] 239/9 239/11 363/9</p> <p>384/15 386/3</p> <p>bias [1] 331/10</p> <p>big [3] 271/17 274/4 311/18</p> <p>Bill [2] 252/11 252/20</p> <p>binder [6] 240/19 240/21 251/21</p> <p>258/9 258/10 362/21</p> <p>binders [7] 220/25 221/2 241/1</p> <p>241/1 251/22 251/25 258/8</p> <p>binding [1] 366/19</p> <p>birthday [2] 254/3 254/9</p> <p>bit [24] 227/16 228/10 228/13</p> <p>230/9 234/3 249/4 261/25 270/14</p> <p>278/5 278/16 280/1 280/13</p> <p>280/14 290/19 308/14 315/1</p> <p>320/25 324/8 325/20 329/19</p> <p>362/19 388/8 400/20 416/8</p> <p>bits [3] 363/15 390/2 390/18</p> <p>black [4] 230/16 231/12 404/17</p> <p>404/18</p> <p>block [2] 297/22 313/21</p> <p>blue [2] 362/21 362/21</p> <p>book [29] 244/17 245/11 245/18</p> <p>245/20 271/6 327/23 327/24</p> <p>329/4 329/11 329/12 329/13</p> <p>329/17 329/19 330/1 330/13</p> <p>338/15 340/15 352/17 352/18</p> <p>358/9 359/12 359/23 359/25</p> <p>360/3 362/21 369/3 373/22 394/7</p> <p>394/9</p> <p>Booker [4] 244/17 245/11</p> <p>245/15 245/18</p> <p>booklet [9] 408/20 409/8 409/16</p> <p>409/17 409/23 410/5 410/16</p> <p>411/19 413/24</p> <p>booklets [1] 407/18</p> <p>books [4] 329/5 355/20 408/14</p> <p>425/10</p> <p>borderline [2] 398/14 398/18</p> <p>both [11] 227/20 272/6 288/8</p> <p>342/9 342/17 343/6 343/11</p> <p>343/21 344/10 348/6 350/14</p> <p>bother [1] 357/7</p> <p>bothered [1] 423/11</p> <p>bottom [5] 249/5 253/24 307/17</p> <p>319/14 413/10</p>	<p>boxes [1] 225/16</p> <p>boy [3] 335/19 403/17 404/14</p> <p>boy's [2] 335/20 335/22</p> <p>boys [1] 308/16</p> <p>BRADY [3] 219/6 219/8 220/17</p> <p>braiding [1] 302/2</p> <p>braids [1] 301/11</p> <p>brain [9] 375/3 375/7 375/8</p> <p>377/19 379/19 382/10 382/12</p> <p>382/14 382/22</p> <p>brains [1] 255/19</p> <p>Brannan [1] 219/2</p> <p>Bread [2] 316/8 316/9</p> <p>break [9] 222/17 222/20 256/13</p> <p>256/14 259/23 326/5 331/6 393/3</p> <p>426/13</p> <p>breath [1] 281/18</p> <p>Brew [1] 244/8</p> <p>brief [2] 386/16 395/19</p> <p>briefly [1] 295/3</p> <p>bring [5] 257/1 284/6 348/3</p> <p>381/5 391/1</p> <p>Bro [1] 244/11</p> <p>broad [3] 287/12 288/12 323/1</p> <p>broadier [2] 248/3 270/3</p> <p>broke [1] 327/11</p> <p>broken [1] 426/15</p> <p>Brooklyn [2] 218/5 218/16</p> <p>Brookwood [23] 300/10 300/21</p> <p>300/23 300/24 301/4 310/2 311/2</p> <p>311/9 314/1 314/14 323/25</p> <p>324/15 324/16 324/17 324/19</p> <p>324/21 400/4 400/6 400/11</p> <p>400/19 401/12 420/7 420/10</p> <p>brought [6] 345/19 378/7 394/18</p> <p>403/7 415/15 417/21</p> <p>Buckbaum [1] 375/5</p> <p>Bucksbaum [1] 377/20</p> <p>budget [2] 270/7 309/18</p> <p>bunch [3] 228/16 247/6 318/17</p> <p>BURT [12] 219/1 219/3 220/17</p> <p>223/8 252/4 257/20 295/25</p> <p>392/25 393/12 415/15 420/22</p> <p>428/3</p> <p>Burt's [1] 296/6</p> <p>business [1] 413/2</p> <p>businesses [1] 312/2</p> <p>busy [1] 299/22</p> <p>Butt [1] 268/17</p> <p>buy [3] 316/5 316/8 318/2</p> <p>buying [2] 312/12 318/17</p>
			<p>C</p> <p>C-1 [2] 221/11 428/10</p> <p>C-4 [4] 258/6 258/11 310/20</p> <p>400/20</p> <p>C-5 [4] 258/8 258/9 258/10</p> <p>258/12</p> <p>C-6 [2] 221/11 428/10</p> <p>C1 [6] 221/1 221/3 221/5 221/7</p> <p>221/9 241/3</p> <p>C6 [1] 241/4</p> <p>Cadman [1] 218/15</p> <p>cafeteria [2] 222/5 222/13</p> <p>calculation [2] 397/5 397/14</p> <p>California [1] 219/2</p> <p>call [17] 250/19 254/16 260/1</p> <p>271/22 289/21 291/25 325/10</p> <p>325/22 331/21 332/3 332/8</p> <p>334/17 334/20 348/8 361/20</p> <p>388/2 405/12</p> <p>called [10] 235/11 235/18 271/4</p> <p>353/12 365/1 366/16 405/19</p>

<p>C called... [3] 419/10 419/14 419/22 calling [2] 220/7 324/16 calls [15] 254/17 254/19 254/19 254/20 254/22 255/7 255/23 262/22 265/16 293/6 332/10 332/12 359/2 361/11 407/14 came [10] 263/18 304/18 313/2 316/10 323/3 334/15 355/14 361/16 410/22 417/3 can [147] 221/25 222/4 222/13 222/17 222/18 224/7 225/20 228/25 229/9 229/12 229/21 230/12 230/16 231/12 233/16 235/7 235/22 239/19 240/21 243/13 246/11 246/12 248/20 250/4 255/18 255/25 256/11 257/14 257/19 259/14 261/17 261/19 261/23 263/3 263/6 263/22 265/1 271/18 271/25 272/1 272/5 272/17 273/11 273/19 274/5 274/7 275/15 276/2 277/19 277/21 278/2 278/17 282/16 282/22 282/24 286/10 287/12 287/16 287/20 290/20 291/13 297/7 297/13 300/4 303/5 303/14 303/19 304/1 304/22 305/9 306/6 306/8 307/4 307/14 307/14 311/4 313/20 315/16 318/10 319/14 320/4 320/15 325/11 332/21 335/3 335/15 337/7 342/2 342/4 342/5 342/6 342/7 342/7 342/17 342/22 346/7 346/18 348/20 348/24 349/1 352/6 353/7 357/8 359/6 359/15 360/15 362/3 362/8 362/19 363/16 367/9 368/10 368/23 370/10 370/13 370/20 370/24 371/5 371/11 371/16 378/24 382/4 390/20 390/21 399/4 399/18 406/16 406/25 407/19 408/20 408/24 409/9 414/2 414/7 414/20 415/21 416/20 417/1 417/14 418/11 422/24 423/24 423/24 425/5 425/12 426/11 426/19 can't [34] 223/16 223/23 231/19 231/25 233/17 235/8 237/21 246/22 247/24 252/24 268/4 269/19 270/9 281/5 283/10 284/14 284/21 284/25 285/19 285/20 286/16 298/5 306/1 306/25 307/17 315/19 317/16 320/5 321/6 370/14 379/12 382/20 392/2 415/18 cannot [4] 288/22 321/3 328/16 350/19 capabilities [1] 318/9 capacity [1] 401/6 Capital [1] 353/12 capitalized [1] 357/22 capture [1] 386/24 card [4] 286/24 288/1 310/7 310/10 cards [1] 309/6 care [8] 291/13 298/9 298/9 305/19 315/3 331/14 364/16 417/10 caretakers [1] 339/4 carry [1] 221/24 case [40] 225/12 235/24 241/5</p>	<p>247/12 247/25 249/20 262/24 271/6 293/18 296/21 300/30 303/31 324/6 339/23 339/23 341/5 341/7 343/20 344/9 344/14 345/22 365/22 366/2 373/7 374/10 374/21 377/17 379/20 386/22 389/4 399/2 408/19 411/6 412/21 421/4 422/11 422/20 422/25 423/16 423/22 cases [3] 228/10 348/19 353/12 casual [1] 300/25 catch [1] 224/18 categories [3] 278/13 325/21 325/21 categorize [2] 248/6 278/4 category [4] 277/25 278/1 298/8 326/2 category-wise [1] 326/2 causation [1] 406/3 causative [1] 348/19 cause [9] 218/11 220/7 348/18 370/15 379/11 379/12 379/21 379/25 406/25 caused [3] 282/18 382/15 385/21 causes [1] 300/5 causing [1] 227/5 cautious [1] 399/6 CD [2] 254/22 260/5 CELIA [2] 218/17 220/13 cell [2] 321/23 392/11 central [1] 426/16 certain [13] 237/10 237/25 288/9 296/23 321/3 330/4 330/7 334/14 337/8 342/22 343/23 371/2 371/3 certainly [13] 269/7 275/11 286/3 293/17 294/1 294/2 298/19 299/5 315/16 336/18 375/17 376/2 425/6 CERTIFICATE [1] 427/9 certify [1] 427/10 cetera [2] 238/4 270/7 chain [5] 305/25 306/6 306/8 306/15 374/19 chairs [2] 425/8 425/8 chameleon [2] 279/21 280/2 chance [4] 235/9 283/2 407/4 417/25 change [3] 268/4 386/17 424/14 changed [3] 230/20 338/7 420/2 changes [4] 233/24 234/2 351/21 355/10 channel [5] 363/5 363/5 388/18 388/20 388/21 chaotic [2] 300/2 302/1 chapter [1] 373/22 characteristic [1] 369/18 characteristics [3] 224/25 237/25 239/4 characterization [1] 376/1 characterize [1] 399/15 characterizes [1] 399/14 chart [19] 258/16 258/18 258/20 259/4 267/3 313/6 353/17 354/21 354/25 355/9 355/15 356/20 358/10 366/3 381/24 395/1 400/21 418/7 418/8 check [1] 261/3 checked [3] 261/2 331/5 353/2 checks [1] 311/22 chess [7] 309/24 310/2 310/9 310/12 310/13 311/5 311/9 child [26] 250/4 281/21 295/12 297/18 297/18 299/6 321/2 321/3</p>	<p>333/25 333/25 334/21 335/16 339/6 339/6 339/6 341/10 341/10 361/19 368/25 371/4 386/5 391/10 403/14 405/12 416/23 417/5 child's [3] 339/19 371/8 375/9 childhood [2] 299/10 348/14 childlike [1] 279/16 children [11] 281/14 286/13 368/15 369/18 388/12 388/13 388/14 396/20 405/11 405/19 416/25 choice [2] 336/2 336/15 choose [4] 280/6 287/19 317/25 369/24 chose [3] 236/24 280/23 298/5 church [1] 312/3 circle [2] 230/4 305/18 circled [2] 267/25 267/25 circling [1] 305/18 circumstance [2] 346/16 346/17 circumstances [2] 337/8 337/9 cite [3] 357/18 372/1 377/2 cited [10] 269/11 309/8 352/17 352/18 357/12 358/25 359/10 360/11 414/13 414/24 cites [1] 372/18 citing [4] 309/11 322/8 357/13 360/10 claim [1] 391/9 claimed [1] 391/9 clarify [3] 228/2 244/11 282/22 class [1] 344/15 classes [1] 416/14 classification [2] 340/19 394/8 classified [1] 345/9 classroom [1] 281/15 cleanest [1] 321/24 cleaning [1] 280/16 clear [3] 232/19 308/10 415/10 clearly [6] 244/12 253/3 272/20 277/5 310/5 416/20 clerk [1] 260/24 clinical [21] 351/8 362/5 363/17 373/12 373/18 373/22 373/25 374/6 374/23 394/16 395/25 396/4 398/24 399/10 415/25 416/7 416/10 417/10 417/13 419/7 419/16 clinically [1] 396/3 clinician [2] 406/9 416/19 close [1] 337/18 closed [1] 364/17 closer [2] 264/20 335/11 closest [1] 417/18 clothes [2] 300/25 318/18 CLR [2] 219/18 427/14 clues [2] 279/6 279/8 cocaine [1] 299/17 cocktail [6] 224/2 268/22 391/2 391/4 391/10 391/13 coexisting [2] 342/8 343/21 cognition [3] 248/1 287/3 369/1 cognitive [17] 248/7 287/17 341/8 344/7 351/9 351/10 363/19 364/8 369/4 370/16 371/9 377/15 397/6 397/8 397/15 397/19 415/3 COHEN [6] 218/17 220/13 222/25 259/20 327/8 361/11 coincidence [1] 263/18 collected [2] 321/1 356/5 collection [1] 358/2 COLLEEN [3] 219/6 219/8</p>	<p>220/17 blended [4] 319/5 319/11 320/11 320/11 colleges [3] 320/3 320/8 320/15 combination [3] 346/24 347/17 392/8 come [20] 232/1 233/12 264/20 265/21 277/19 277/21 282/24 284/22 290/5 290/6 308/11 313/20 322/22 322/23 336/4 340/13 348/5 357/8 385/17 391/6 comes [5] 263/7 265/4 280/21 299/3 405/14 comfortable [1] 386/14 coming [8] 229/10 232/6 232/7 265/24 305/24 339/10 345/21 398/8 comment [2] 248/16 418/15 commenting [1] 271/10 comments [1] 363/8 committed [1] 298/20 common [12] 226/25 226/25 266/2 266/3 266/6 301/15 305/10 343/4 343/12 387/24 407/9 415/3 commonly [1] 343/13 communicate [2] 294/10 390/9 communicated [2] 272/19 285/8 communicating [1] 390/4 communication [15] 230/24 231/25 234/18 248/8 248/11 248/14 248/25 249/3 249/6 249/16 266/25 333/20 333/21 361/6 389/9 community [6] 311/17 311/19 311/24 311/25 312/2 315/2 comorbid [3] 341/9 341/13 348/16 Comorbidity [1] 346/6 compare [2] 272/16 273/6 compared [5] 267/10 274/25 275/1 370/5 382/10 compares [1] 275/3 comparing [1] 262/8 competence [3] 417/23 417/24 418/6 competencies [1] 391/6 competency [3] 401/20 414/12 414/12 compiled [2] 375/23 422/3 compiles [1] 313/12 complaining [1] 221/23 complete [3] 251/20 258/17 385/11 complex [3] 273/8 337/21 348/13 complexity [1] 272/18 compliance [1] 387/2 complicated [1] 341/7 complies [1] 360/23 comports [1] 236/11 comprehend [3] 248/12 248/15 408/8 comprehending [1] 337/21 comprehension [3] 408/9 408/13 408/17 comprehensive [1] 397/12 compulsive [1] 403/12 compute [1] 395/6 computer [3] 219/21 315/16 400/24 Computer-aided [1] 219/21 computerized [1] 219/20 concede [1] 373/18 concept [22] 225/7 227/15</p>
--	--	---	---

<p>concept... [20] 227/15 227/17 228/3 228/11 228/11 231/5 237/6 248/3 250/15 262/7 264/3 266/19 284/8 284/25 289/9 307/20 330/13 361/15 397/4 397/13 concepts [4] 231/17 232/9 240/11 392/8 conceptual [1] 278/7 concern [2] 358/5 392/1 concerned [5] 303/15 307/21 335/22 349/8 418/2 concerns [3] 223/7 346/3 417/20 conclude [1] 413/3 concluded [1] 399/11 conclusion [9] 290/6 317/16 320/5 339/10 388/5 390/20 399/7 415/22 418/11 conclusions [1] 340/14 concrete [5] 227/17 228/11 395/20 396/8 399/14 condemned [1] 363/4 condition [2] 370/23 375/9 conditions [3] 343/21 348/16 371/3 conduct [1] 279/21 conducted [1] 363/21 Confers [1] 260/24 confined [1] 369/17 conflict [1] 280/23 conflicting [1] 370/2 conflicts [1] 281/13 confronted [1] 386/8 confusion [1] 251/8 connection [1] 229/22 consciousness [1] 226/12 consent [1] 258/25 consequence [1] 364/6 consequently [4] 247/16 286/20 369/5 405/16 consider [9] 268/23 307/22 307/25 308/21 309/24 309/25 314/11 318/14 381/6 considered [2] 282/5 303/14 considering [2] 338/25 375/9 consistent [12] 322/13 322/16 397/5 397/8 397/14 397/19 398/10 399/1 399/3 399/5 402/14 418/19 construct [1] 226/8 consult [1] 303/5 contact [2] 355/16 355/23 contacted [1] 355/16 contain [2] 363/6 376/16 contained [2] 230/24 249/19 contains [3] 258/10 259/5 310/20 contemporary [1] 389/9 content [1] 273/15 context [15] 237/18 241/21 266/16 277/2 319/4 319/23 322/18 341/4 349/2 349/3 393/25 394/6 394/7 394/11 417/15 continual [1] 389/6 continue [6] 257/14 327/5 327/8 393/10 393/12 393/19 continued [8] 223/1 256/15 311/9 326/11 327/9 374/15 389/12 421/6 contradicted [1] 361/3 control [1] 251/15 controlling [1] 396/4</p>	<p>conversation [49] 224/1 224/4 224/7 225/5 249/8 249/9 265/8 265/20 267/2 267/4 267/6 267/14 268/19 268/21 268/23 272/8 272/15 272/16 276/23 277/11 284/8 290/20 291/7 291/10 292/19 292/20 292/25 293/14 293/16 294/8 331/24 333/2 333/5 333/14 334/18 336/19 336/20 337/2 337/3 361/12 361/21 389/8 390/23 391/8 391/11 391/12 391/13 391/24 392/13 conversations [5] 294/3 294/11 363/16 396/2 399/15 conveyed [1] 356/11 convince [2] 290/5 334/12 convincing [1] 290/8 cook [8] 321/4 331/3 331/5 331/9 426/6 426/11 426/19 426/25 Cooke [6] 298/15 316/11 321/18 321/20 323/3 323/19 Cooke's [1] 318/21 cooperate [1] 222/15 cooperation [1] 413/18 cooperative [1] 395/18 copied [2] 308/9 308/10 copies [3] 229/9 240/17 241/3 copy [15] 229/8 229/11 229/13 240/18 240/24 243/6 243/10 306/11 313/9 352/22 352/23 354/7 354/13 354/14 354/15 copying [2] 232/2 243/11 copyright [8] 329/5 329/15 356/2 356/8 357/14 357/15 357/25 423/8 correct [425] corrected [2] 367/13 368/5 correction [1] 362/10 corrections [1] 258/7 correctly [10] 263/12 275/13 286/8 286/11 290/9 408/25 409/4 409/7 409/20 410/6 correctness [1] 412/23 corresponding [5] 252/9 272/11 297/19 319/24 365/17 cost [2] 317/12 317/14 could [64] 226/16 231/23 232/10 233/18 237/11 237/17 239/23 240/9 249/7 249/8 252/25 267/3 269/21 273/13 273/13 274/14 278/13 279/18 280/8 280/11 282/7 282/18 289/23 290/24 294/6 295/1 297/18 299/6 299/24 300/2 308/18 311/20 311/21 311/21 312/22 315/15 315/23 321/9 322/1 322/9 323/14 324/25 328/20 337/5 341/20 346/16 350/3 353/11 353/11 353/23 357/6 363/2 372/22 376/4 376/4 377/21 378/8 380/8 382/15 382/17 385/21 406/24 410/1 410/4 could've [2] 380/25 385/23 couldn't [10] 265/21 310/6 316/4 318/24 323/21 362/19 380/13 406/2 410/8 411/4 counsel [13] 220/10 229/12 233/23 234/1 251/4 251/16 254/18 258/15 259/6 259/6 282/24 302/9 313/7 count [1] 307/18 counter [1] 345/23 counterbalanced [1] 372/22</p>	<p>country [1] 236/20 debtor [1] 236/20 417/9 course [11] 259/6 279/6 299/7 314/1 314/7 318/25 338/21 354/23 385/1 391/24 411/20 court [40] 218/1 219/18 219/18 220/1 220/2 220/4 240/18 241/2 256/4 256/6 260/16 261/4 261/6 262/1 264/18 265/6 290/23 291/1 302/8 302/11 302/19 303/6 303/15 303/20 313/9 327/4 352/23 354/7 379/3 380/15 384/20 393/22 394/22 394/24 406/15 413/3 415/11 415/21 425/6 427/14 court's [9] 255/9 304/14 306/10 353/11 364/14 378/9 414/6 414/11 426/21 Courthouse [1] 218/5 courtroom [2] 260/18 349/13 cousin [1] 314/16 cover [1] 273/19 covered [2] 341/14 345/2 CR [2] 218/3 220/8 crack [1] 299/17 created [2] 240/5 308/8 creativity [2] 329/24 329/25 credit [3] 286/24 407/9 409/14 crew [2] 280/12 282/2 cried [1] 275/5 crime [9] 255/8 295/18 296/19 298/20 338/16 369/12 377/20 379/4 382/11 criminal [4] 218/11 220/7 360/4 362/2 criminally [1] 398/23 criteria [6] 296/18 342/10 350/5 350/16 350/16 350/21 critical [1] 398/15 cross [34] 220/21 223/1 223/10 257/14 259/7 265/17 288/8 327/6 327/9 338/7 341/25 345/9 345/13 347/6 347/14 348/3 359/1 359/5 376/4 378/3 378/7 379/7 380/3 383/21 383/24 384/16 384/22 386/7 394/19 394/20 395/11 420/16 426/10 426/15 cross-examination [16] 220/21 223/1 223/10 257/14 327/6 327/9 338/7 341/25 359/1 379/7 383/21 383/24 384/16 394/19 394/20 420/16 cross-examining [1] 259/7 cross-sectional [1] 384/22 CRR [2] 219/18 427/14 cry [7] 254/8 254/10 268/6 268/7 268/7 268/7 268/8 crystallized [1] 363/11 cultural [1] 312/6 current [8] 295/16 315/17 365/13 365/19 365/20 366/12 388/4 416/12 Currently [1] 272/13 custodial [2] 255/11 393/24 custody [5] 334/21 334/24 335/1 335/4 335/16</p>	<p>D Daphne [3] 319/16 319/17 data [21] 358/2 358/3 362/6 363/15 363/23 374/4 375/22 382/13 408/24 409/24 411/10 414/3 417/17 418/12 420/24 422/2 422/5 422/8 422/22 424/8 424/11 date [31] 253/25 253/25 254/3 260/10 260/11 264/9 264/13 298/19 332/7 353/8 353/18 354/22 354/23 355/9 356/5 356/5 356/6 356/8 356/9 356/10 356/21 357/9 357/11 357/13 357/15 412/7 412/8 413/22 422/21 423/1 423/8 dated [4] 290/13 403/10 403/10 404/10 dates [13] 353/19 354/21 354/25 355/10 357/11 357/16 357/17 357/20 357/25 358/4 358/5 358/6 411/14 dating [1] 331/7 daughter [2] 319/18 320/14 daughters [1] 316/21 DAVID [2] 218/22 220/18 Davis [7] 239/11 422/11 422/20 422/25 422/25 423/16 423/22 day [16] 221/23 222/6 234/9 254/7 284/14 284/15 285/15 285/19 285/20 305/20 322/14 322/22 342/14 371/3 371/12 425/15 days [13] 268/4 322/11 322/14 322/23 323/8 325/23 411/12 411/21 411/25 412/2 412/10 412/13 417/9 daytime [1] 334/5 de [1] 390/8 dead [1] 349/8 deal [6] 268/25 320/4 328/15 355/18 363/4 389/7 dealing [2] 295/15 415/24 deals [1] 320/11 Deals.com [1] 319/15 death [2] 347/18 363/4 debilitating [1] 398/21 December [1] 349/15 December 11th [1] 349/15 decide [6] 256/4 318/1 329/14 329/15 408/11 416/15 decided [2] 280/18 297/20 deciding [1] 381/8 decision [11] 246/11 246/15 246/18 247/9 247/12 247/16 292/1 296/2 297/7 346/22 420/5 decisions [4] 246/16 246/16 247/7 247/9 deep [1] 243/10 deeper [2] 287/12 391/4 defendant [15] 218/7 218/19 218/20 219/1 219/6 220/2 220/18 257/1 327/4 346/22 392/12 393/13 393/16 393/17 393/18 Defendant's [5] 221/11 352/21 354/11 357/3 428/8 defendants [1] 363/7 defense [19] 221/7 221/9 229/12 229/14 241/3 248/20 251/6 251/16 254/18 254/24 255/3 258/15 302/9 311/13 313/7 354/3 354/5 354/18 421/4 defense's [1] 255/24</p>
---	--	--	---

<p>D</p> <p>defer [1] 267/9</p> <p>Defiant [4] 404/25 405/12 405/18 405/20</p> <p>deficient [5] 397/5 397/8 397/14 397/19 415/12</p> <p>deficit [10] 249/6 249/16 286/17 294/4 310/5 311/19 311/19 338/10 338/13 342/4</p> <p>deficit/hyperactivity [1] 342/4</p> <p>deficits [5] 267/1 296/19 344/10 361/5 363/19</p> <p>defined [6] 311/25 328/20 338/14 352/15 424/10 424/11</p> <p>defining [2] 361/15 423/13</p> <p>definitely [2] 248/5 260/19</p> <p>definition [4] 225/22 248/22 248/24 312/7</p> <p>definitions [1] 226/2</p> <p>degree [5] 268/3 273/17 273/18 362/4 399/7</p> <p>degrees [2] 328/11 328/12</p> <p>delay [2] 309/2 387/25</p> <p>delayed [1] 298/12</p> <p>delineate [1] 415/11</p> <p>delve [1] 348/7</p> <p>demands [1] 290/4</p> <p>demonstrates [2] 272/14 361/11</p> <p>demonstrative [2] 313/8 313/10</p> <p>Denies [1] 403/16</p> <p>Denny [1] 317/12</p> <p>Denny's [1] 409/23</p> <p>dependent [1] 368/18</p> <p>depending [3] 339/19 369/24 417/4</p> <p>depends [3] 227/14 249/23 390/9</p> <p>DePetra [6] 273/12 273/23 274/20 275/4 317/10 320/10</p> <p>DePetra's [1] 319/17</p> <p>depression [1] 342/5</p> <p>derived [1] 408/22</p> <p>describe [10] 237/9 237/13 237/22 237/23 237/25 240/10 240/11 242/5 261/19 416/18</p> <p>described [1] 236/15</p> <p>describes [2] 231/11 241/24</p> <p>describing [4] 230/19 239/2 246/20 328/9</p> <p>description [3] 239/18 240/8 363/18</p> <p>designer [2] 316/19 316/22</p> <p>desire [1] 280/3</p> <p>desires [1] 290/4</p> <p>despite [3] 315/18 383/11 402/21</p> <p>detail [3] 225/6 404/17 404/21</p> <p>detailed [1] 416/24</p> <p>determination [2] 256/8 426/21</p> <p>determine [9] 293/19 294/4 312/18 379/12 406/2 409/3 409/11 410/3 410/4</p> <p>determined [1] 409/19</p> <p>determining [2] 363/18 388/3</p> <p>develop [2] 375/18 424/12</p> <p>developed [1] 272/24</p> <p>developing [1] 400/8</p> <p>development [2] 358/3 424/13</p> <p>developmental [2] 338/17 398/22</p> <p>deviation [1] 367/15</p> <p>deviations [1] 397/16</p> <p>diagnose [7] 339/1 339/13 359/7</p>	<p>359/7 373/13 379/19 385/3 385/5 344/12 349/5</p> <p>346/7 347/6 350/6 376/17 384/19 404/22</p> <p>diagnoses [1] 386/23</p> <p>diagnosing [4] 341/4 350/1 350/25 376/11</p> <p>diagnosis [46] 340/19 341/13 341/16 342/1 342/8 342/11 344/22 344/25 345/6 345/16 345/18 345/20 345/23 346/12 346/15 347/8 348/1 348/17 350/7 350/14 350/19 350/19 350/23 375/6 376/5 378/5 378/9 378/18 379/8 379/12 380/13 380/25 384/18 385/5 385/12 385/17 386/21 386/23 398/18 399/2 404/24 405/2 405/18 406/9 406/10 416/24</p> <p>diagnostic [3] 339/16 362/7 378/19</p> <p>diagnostically [1] 348/15</p> <p>diagnosticians [1] 340/17</p> <p>dictionaries [1] 364/5</p> <p>did [76] 224/17 235/18 236/17 249/8 252/10 261/10 262/3 262/4 263/23 265/22 267/6 267/17 276/13 280/17 280/19 280/22 293/15 296/21 300/2 301/19 301/22 309/24 310/3 311/8 311/22 318/16 320/11 322/21 322/23 322/24 323/14 325/5 325/5 325/7 334/7 348/12 355/8 355/23 356/19 358/20 364/13 367/7 368/21 369/8 374/19 375/14 375/14 376/10 377/17 377/23 379/23 380/11 380/11 381/6 381/6 383/9 383/12 384/21 385/8 386/24 395/4 395/8 395/11 399/5 400/2 400/24 404/3 404/7 408/24 410/1 410/6 411/20 411/24 412/2 416/1 425/24</p> <p>didn't [81] 221/18 223/11</p> <p>224/17 224/19 234/8 240/15 251/7 261/16 262/18 262/21 263/20 263/25 264/2 266/21 270/21 271/19 274/17 276/3 277/20 283/2 285/4 285/12 287/5 294/1 295/10 296/15 297/24 298/22 307/23 308/19 309/23 310/1 310/2 310/4 311/12 312/23 314/17 316/8 316/9 316/18 318/15 318/18 322/5 330/6 335/6 341/21 341/25 345/22 346/12 351/23 352/1 354/14 373/12 378/5 379/8 379/17 379/25 380/4 384/24 385/2 385/3 385/6 385/10 385/16 385/16 395/5 404/21 405/6 407/3 410/16 410/17 410/21 410/22 410/25 411/9 411/10 411/19 422/13 422/16 423/12 423/20</p> <p>died [1] 271/9</p> <p>difference [12] 224/7 227/9 272/15 272/18 277/17 328/8 342/14 356/2 367/23 388/10 399/18 416/11</p> <p>differences [6] 234/13 277/18 290/7 406/23 406/24 406/24</p> <p>different [33] 230/9 230/14 231/3 232/2 236/6 250/15 254/12 258/5 278/19 279/25 280/1 285/22 285/23 287/10 294/23</p>	<p>300/5 308/13 308/14 308/16 310/5 309/1 339/24 348/9 348/25 352/2 353/19 370/17 386/4 392/5 399/14 415/17 415/17 420/1</p> <p>differentiate [1] 415/11</p> <p>differently [3] 242/8 274/24 278/5</p> <p>difficult [20] 227/16 227/19 228/6 255/16 264/21 266/14 277/15 299/10 299/15 308/11 308/15 309/12 314/8 315/1 315/12 318/6 318/8 320/19 322/17 324/9</p> <p>difficulties [2] 281/25 403/13</p> <p>difficulty [11] 238/5 267/13 281/15 287/3 288/23 298/4 298/7 315/4 315/8 337/11 361/15</p> <p>dig [4] 224/6 231/19 237/23 277/17</p> <p>digs [2] 293/4 293/6</p> <p>dinner [1] 222/9</p> <p>direct [22] 223/14 237/12 239/10 257/19 268/2 288/8 289/22 289/25 341/14 358/11 365/6 368/10 370/12 371/10 376/23 378/7 380/8 380/12 380/17 392/17 425/19 426/8</p> <p>direction [5] 289/2 289/5 289/6 334/23 418/1</p> <p>directions [1] 249/8</p> <p>directly [2] 288/12 337/12</p> <p>disabilities [6] 339/1 348/25 349/7 351/9 368/15 369/18</p> <p>disability [86] 223/21 226/17 226/20 226/22 247/19 255/10 282/12 282/15 282/15 287/6 287/21 324/2 338/18 339/13 340/21 341/5 341/16 342/1 342/3 342/3 342/10 342/15 342/18 342/24 343/1 343/2 343/3 343/4 343/4 343/6 343/6 343/11 343/11 343/19 344/11 344/11 344/15 344/23 345/5 345/16 345/17 346/9 346/16 346/21 346/23 346/24 347/7 347/10 347/12 347/13 347/16 347/22 347/23 348/2 348/17 348/19 350/1 350/5 350/7 350/8 350/20 350/22 351/1 351/11 359/8 364/2 373/13 373/14 375/6 376/24 382/25 383/16 384/3 384/19 385/1 385/3 387/22 387/25 388/4 399/2 401/3 401/6 402/15 415/23 416/13 417/16</p> <p>disabled [2] 338/8 363/22</p> <p>disagree [2] 258/17 376/1</p> <p>disagreement [2] 424/4 424/6</p> <p>discern [1] 232/5</p> <p>discharge [2] 315/9 401/14</p> <p>disconnected [1] 334/16</p> <p>discovered [1] 221/1</p> <p>discovery [2] 254/21 363/5</p> <p>discrepancy [4] 343/13 343/14 344/7 399/9</p> <p>discuss [3] 269/24 346/5 380/23</p> <p>discussed [5] 223/5 228/24 360/6 365/6 380/17</p> <p>discussing [1] 415/15</p> <p>discussion [5] 351/16 380/24 381/15 381/18 418/1</p> <p>disease [1] 377/13</p> <p>Disk [1] 332/5</p>	<p>Disk 50 [1] 332/5</p> <p>disorder [16] 342/1 344/16 346/7 350/11 350/13 377/13 383/15 387/7 387/11 387/13 404/25 405/1 405/12 405/19 405/20</p> <p>disorders [1] 350/14</p> <p>disparities [5] 415/20 415/22 417/8 417/21 418/21</p> <p>distinguish [4] 279/18 295/1 343/8 405/16</p> <p>distinguishing [1] 297/23</p> <p>DISTRICT [6] 218/1 218/1 218/12 218/15 220/4 220/4</p> <p>disturbance [4] 282/19 342/25 348/16 403/5</p> <p>disturbed [2] 282/8 351/23</p> <p>DMS [2] 278/11 278/14</p> <p>do [171] 222/16 222/18 223/17 224/2 224/24 225/4 225/24 229/5 229/8 229/21 230/22 232/4 233/8 233/12 233/16 235/7 235/9 235/24 236/2 236/5 236/5 238/23 240/12 242/2 242/8 242/18 244/16 244/25 245/4 245/9 245/15 246/11 246/11 246/12 246/14 246/14 246/15 246/15 251/11 251/13 255/6 257/20 258/25 259/24 262/24 264/22 264/24 267/11 268/16 271/22 275/15 280/2 286/10 286/12 287/5 287/17 287/17 288/22 289/8 289/23 292/4 294/10 300/7 300/12 300/20 300/20 300/25 301/12 301/16 301/23 305/6 307/13 307/14 307/17 308/4 308/20 310/10 310/22 314/24 315/12 316/1 316/9 316/19 320/24 321/12 324/25 325/17 329/16 332/16 335/7 338/10 338/12 338/13 338/17 338/19 339/1 339/12 339/15 341/18 342/15 342/16 343/3 343/3 343/8 343/10 349/22 350/10 350/16 351/5 351/16 351/18 355/8 356/4 358/5 358/9 358/18 360/3 360/24 360/25 362/14 362/25 366/22 367/11 370/18 370/19 370/20 371/5 372/5 372/6 372/8 373/8 378/21 379/2 379/11 380/3 384/6 386/10 388/21 390/25 392/16 393/23 394/9 394/19 395/20 395/24 395/25 400/2 400/17 402/20 403/3 403/7 405/13 408/14 408/15 408/16 410/8 413/9 414/24 415/21 416/2 416/13 417/1 418/6 418/25 419/7 419/8 420/7 423/10 425/12 426/10 426/11</p> <p>Docket [1] 220/8</p> <p>doctor [10] 264/19 296/6 296/6 332/14 346/20 382/9 385/16 385/21 387/20 418/5</p> <p>doctors [3] 379/8 379/15 384/21</p> <p>document [14] 232/15 234/21 252/9 279/8 285/13 320/5 382/6 395/24 399/22 407/23 408/4 411/8 411/13 413/11</p> <p>documentation [1] 378/10</p> <p>documented [2] 221/17 375/4</p> <p>documenting [1] 378/16</p> <p>documents [3] 251/5 251/11 425/5</p>
--	--	---	---

<p> D does [60] 231/2 236/20 237/2 239/25 244/12 260/3 260/8 269/25 272/21 275/2 281/1 281/6 281/8 286/16 294/9 298/1 335/24 340/16 341/24 344/21 345/16 346/5 347/9 347/12 347/22 347/22 348/18 350/6 350/10 350/15 350/17 359/14 362/6 363/20 365/18 366/22 367/17 368/1 369/10 371/22 372/2 373/25 377/10 378/14 378/14 382/11 383/14 386/4 390/1 390/5 390/14 391/19 396/7 397/7 399/20 402/11 405/2 412/4 413/12 416/23 doesn't [26] 240/3 259/16 267/13 273/16 286/22 293/4 298/4 306/2 343/19 345/11 345/12 345/17 345/18 347/25 348/1 350/21 373/23 375/5 375/19 376/2 385/15 387/7 387/16 404/20 405/13 414/21 dog's [1] 284/16 doing [19] 231/20 234/11 242/3 243/2 248/3 253/4 280/19 311/14 314/9 347/15 349/1 371/1 384/7 392/21 405/14 405/15 409/7 418/10 425/14 Dolce [2] 316/17 316/19 domain [2] 287/2 289/11 domains [7] 269/10 278/10 278/19 281/5 289/9 293/20 333/7 don't [119] 221/4 221/21 222/1 222/3 227/4 227/9 227/21 227/23 228/14 231/21 233/9 235/24 237/15 237/17 237/19 240/17 241/9 241/11 242/22 244/10 245/7 246/24 247/5 248/18 248/18 254/2 258/21 263/10 263/14 263/16 263/17 264/19 268/6 268/7 274/21 277/1 277/3 277/6 283/5 284/20 289/15 289/25 290/6 292/3 292/17 293/12 293/13 297/11 297/13 298/17 298/19 299/7 302/5 303/8 306/21 308/8 308/24 308/24 310/21 313/20 315/23 316/7 316/16 316/21 318/25 319/3 319/4 320/9 324/24 331/19 335/19 336/3 336/4 340/12 340/12 341/14 345/3 345/6 346/4 348/8 348/8 349/1 351/9 352/22 363/23 363/23 364/15 364/16 372/23 375/13 375/24 379/2 380/2 382/2 383/22 384/8 392/2 394/4 394/5 394/11 400/16 400/18 401/15 402/17 412/13 412/15 413/4 413/21 414/3 414/15 414/21 423/20 424/9 425/7 425/10 425/11 425/21 426/12 426/14 done [17] 273/3 280/15 325/22 329/5 344/2 368/6 382/17 401/9 406/6 409/3 409/20 410/13 411/12 412/9 413/5 419/23 426/12 door [2] 349/2 349/6 doses [1] 387/1 double [1] 331/5 double-checked [1] 331/5 down [38] 224/6 231/19 237/23 </p>	<p> 244/5 244/7 244/25 246/9 262/18 262/21 264/22 269/17 269/18 274/12 277/17 290/16 290/17 290/19 293/4 293/6 322/2 332/14 349/7 367/18 367/19 370/2 370/5 370/7 404/3 405/14 406/3 406/6 407/14 407/19 408/10 410/17 417/1 417/15 424/22 downstairs [1] 257/9 Dr [35] 223/3 230/3 230/18 233/4 235/14 249/12 249/13 249/19 290/18 319/21 327/11 327/22 333/2 335/15 338/1 338/6 355/17 422/5 422/9 422/11 422/25 423/15 424/3 425/15 425/18 425/23 426/11 426/12 426/12 426/13 426/14 426/16 426/16 426/21 426/24 Dr. [55] 254/1 259/24 261/8 262/3 265/8 265/9 291/7 297/4 300/23 301/3 301/3 301/6 301/14 304/12 305/10 319/13 319/19 340/1 340/3 340/6 341/16 341/25 345/14 345/15 345/18 346/11 347/6 348/8 349/25 350/6 350/25 352/7 355/17 356/2 356/12 357/5 357/20 373/6 375/5 375/12 377/20 379/14 386/8 386/13 396/2 406/2 409/17 409/23 410/14 413/14 419/6 420/25 421/3 424/9 425/23 Dr. Aranoff [1] 413/14 Dr. Aranoff's [1] 373/6 Dr. Buckbaum [1] 375/5 Dr. Bucksbaum [1] 377/20 Dr. Denny's [1] 409/23 Dr. Drob [7] 341/25 347/6 348/8 349/25 350/6 350/25 425/23 Dr. Drob's [4] 341/16 345/15 345/18 409/17 Dr. Flynn's [1] 424/9 Dr. Frank's [1] 300/23 Dr. Franks [1] 396/2 Dr. George [1] 340/6 Dr. James [2] 340/1 421/3 Dr. Kaufman [6] 355/17 356/2 356/12 357/5 357/20 420/25 Dr. Olley [1] 340/3 Dr. Pop [6] 301/3 301/3 301/6 301/14 305/10 410/14 Dr. Shapiro [19] 254/1 259/24 261/8 262/3 265/8 265/9 291/7 297/4 304/12 319/13 319/19 345/14 346/11 352/7 375/12 379/14 386/8 386/13 419/6 Dr. Shapiro's [1] 406/2 draft [1] 329/8 draw [4] 233/4 241/19 339/3 341/20 drawing [1] 230/3 dressed [5] 301/15 305/9 305/20 306/17 306/18 Drob [9] 341/25 345/4 345/4 347/6 348/8 349/25 350/6 350/25 425/23 Drob's [4] 341/16 345/15 345/18 409/17 drop [3] 285/12 349/13 367/15 drug [2] 382/19 386/5 drugs [7] 325/8 325/9 325/11 383/7 383/11 383/17 385/9 drummed [1] 413/1 DSM [14] 248/8 248/15 248/17 </p>	<p> 278/2 278/2 278/12 278/19 312/7 338/24 339/7 346/14 346/12 350/10 350/18 DSM-IV [1] 350/18 dude [2] 233/10 233/12 Dupree [3] 403/22 403/22 403/24 during [13] 222/17 223/9 223/14 224/1 259/6 331/6 333/5 358/25 391/24 396/10 396/18 400/20 402/22 duties [1] 280/19 dutifully [1] 280/19 dysfunction [2] 348/15 377/15 dyslexia [2] 226/23 227/2 E E-mail [20] 219/20 225/20 230/7 230/18 232/4 235/14 238/6 239/2 242/4 244/5 244/9 252/10 327/12 329/2 329/2 329/10 330/12 356/14 356/19 358/8 E-mailed [1] 254/5 E-mailer [1] 225/10 E-mailing [1] 244/12 E-mails [10] 225/13 225/21 228/22 230/6 241/22 244/8 254/6 254/15 255/23 327/12 e.g [1] 248/25 each [3] 251/21 274/1 274/7 Earl [4] 301/9 395/15 402/9 413/16 Earl's [1] 413/17 earlier [6] 273/5 274/2 300/18 303/14 356/9 394/15 early [13] 275/21 281/13 299/10 299/12 299/14 299/23 309/24 341/7 348/14 380/14 382/9 383/3 387/21 earnings [1] 323/6 ears [1] 361/12 easier [2] 228/10 274/16 easily [1] 239/24 East [1] 218/15 EASTERN [3] 218/1 218/15 220/4 easy [1] 243/5 eat [3] 221/19 221/19 221/20 Edition [1] 396/21 educate [1] 401/2 education [4] 340/18 366/16 377/4 404/12 educational [6] 226/5 394/11 394/23 400/23 401/25 402/21 educationally [1] 400/9 educator [1] 339/19 educators [1] 340/18 effect [23] 353/13 357/9 358/5 364/23 365/7 365/15 365/22 365/24 367/9 367/24 368/2 370/11 371/23 372/2 372/10 372/11 372/18 373/1 379/5 414/4 417/3 422/8 424/10 effects [7] 369/20 377/12 377/12 377/18 377/23 418/14 418/16 efficiency [1] 333/20 effort [4] 296/11 324/25 364/4 400/7 efforts [3] 394/12 401/2 402/22 eight [6] 372/19 372/22 384/24 386/5 409/6 411/17 Eighty [1] 340/22 Eighty-five [1] 340/22 </p>	<p> either [3] 336/15 417/25 426/15 elephant [1] 353/12 Elephant [1] 353/12 elevate [1] 363/10 elevated [2] 368/4 368/4 Eleven [1] 411/17 Eleven-eight-93 [1] 411/17 Elmhurst [4] 281/21 383/3 403/3 405/3 Elmo [5] 304/1 304/2 304/4 304/7 307/5 else [23] 227/16 232/11 243/7 243/8 245/5 262/11 282/16 286/8 291/16 300/18 302/2 306/3 308/4 334/17 342/7 347/17 348/4 355/8 385/14 387/17 392/14 424/19 426/25 else's [2] 308/9 334/1 email [26] 263/5 268/2 268/12 268/18 269/4 269/14 271/4 271/10 277/1 277/7 277/22 277/23 282/25 283/11 283/18 284/6 284/24 288/25 289/12 297/14 297/21 307/15 317/1 317/9 317/10 319/13 emailed [1] 420/25 emailing [2] 268/11 297/19 emails [10] 262/19 267/5 275/2 277/6 283/10 288/20 307/9 307/19 308/2 320/10 embellish [1] 384/8 Embellishment [1] 384/8 emotion [9] 236/15 236/16 236/22 248/16 268/25 269/15 269/15 275/13 283/9 emotional [1] 282/19 emotionally [1] 282/8 emotions [2] 267/10 275/8 emphasis [3] 292/6 357/24 358/4 employed [1] 398/2 employment [1] 325/7 enable [1] 328/13 encompass [1] 289/5 encountered [1] 287/1 encouraged [1] 381/18 end [14] 229/6 230/25 248/24 251/20 252/2 285/12 301/21 301/23 301/23 307/23 341/1 349/8 361/16 372/19 endorsements [1] 311/22 engage [1] 224/4 engaging [1] 267/14 English [1] 285/7 enough [10] 282/5 292/4 296/17 309/2 346/22 360/7 388/15 394/5 395/5 425/9 ensure [2] 329/15 333/24 enter [1] 329/14 enters [1] 393/17 entire [3] 295/8 295/19 325/13 entirely [1] 361/22 entitled [1] 427/11 entry [4] 403/8 403/10 411/10 413/9 environment [6] 255/17 255/18 299/7 398/3 401/25 402/3 equal [1] 415/17 equating [1] 397/17 equipment [2] 260/25 261/3 equivalent [1] 291/22 era [1] 416/12 error [3] 407/1 409/2 424/13 errors [11] 391/23 407/4 407/6 </p>
---	--	--	--

<p>E</p> <p>errors... [8] 407/9 409/12 410/1 410/3 414/25 415/3 415/5 415/5 especially [4] 299/5 299/12 324/11 402/2</p> <p>ESQ [6] 218/14 218/16 218/17 218/22 219/3 219/8</p> <p>essentially [1] 365/24</p> <p>established [2] 366/8 367/5</p> <p>estimated [2] 398/14 410/21</p> <p>et [2] 238/4 270/7</p> <p>ethical [1] 366/19</p> <p>evaluate [4] 303/7 322/17 407/15 418/12</p> <p>evaluated [10] 301/7 339/6 373/11 374/12 374/15 375/15 394/16 402/25 403/21 409/19</p> <p>evaluating [4] 368/25 370/17 394/22 396/3</p> <p>evaluation [18] 232/4 300/23 300/24 374/2 386/6 386/8 394/24 402/20 403/1 403/24 404/2 404/7 404/9 404/11 404/12 404/14 404/15 417/1</p> <p>evaluations [2] 339/5 386/9</p> <p>evaluator [4] 375/22 394/22 403/15 426/2</p> <p>evaluators [2] 301/22 375/25</p> <p>evaluators' [1] 373/7</p> <p>Eve [1] 349/13</p> <p>even [22] 243/8 270/4 272/2 273/11 286/9 292/12 297/1 314/14 315/2 315/3 315/5 318/11 318/12 321/3 368/9 369/14 379/18 380/17 388/19 398/20 399/5 411/4</p> <p>evening [2] 424/25 427/4</p> <p>event [2] 406/7 417/18</p> <p>events [2] 312/6 374/19</p> <p>Eventually [1] 383/6</p> <p>ever [6] 238/24 239/21 287/25 287/25 314/17 394/14</p> <p>every [13] 233/10 236/20 236/20 284/14 284/16 285/19 285/20 375/21 415/18 415/19 417/4 417/4 417/5</p> <p>everybody [4] 230/16 231/12 306/3 328/24</p> <p>Everybody's [2] 265/5 265/25</p> <p>everyday [1] 334/3</p> <p>everyone [10] 257/13 266/2 266/4 271/15 271/16 271/20 274/3 274/19 282/16 393/11</p> <p>everything [4] 234/11 271/15 329/9 415/18</p> <p>evidence [69] 221/3 221/10 221/12 229/20 229/25 230/1 232/21 233/1 233/2 234/5 234/7 236/12 238/16 238/17 240/23 241/15 241/17 242/9 243/21 244/1 244/2 246/1 246/5 246/6 250/23 251/1 251/2 251/17 251/25 253/18 253/21 253/22 254/22 256/7 259/4 259/8 267/22 270/25 271/1 276/19 276/20 284/3 284/4 310/20 313/18 313/19 317/6 317/7 319/10 319/11 327/19 327/20 340/15 344/10 353/25 354/6 354/11 354/16 354/19 356/23 357/2 357/3 360/18 367/10 375/16 375/20 380/22 428/8 428/14</p>	<p>evidenced [1] 330/12</p> <p>exam [10] 246/17 247/25 255/2 255/22 272/7 273/14 278/16 298/17 298/19 412/8</p> <p>exactly [6] 230/22 235/25 255/21 273/16 278/6 316/16</p> <p>exam [1] 365/19</p> <p>examination [34] 220/21 223/1 223/10 223/14 237/12 239/10 257/14 327/6 327/9 338/4 338/7 341/14 341/25 358/11 359/1 365/6 368/10 370/12 371/10 376/23 379/7 380/17 383/21 383/24 384/16 392/17 394/19 394/20 407/22 410/12 411/7 411/9 419/4 420/16</p> <p>examine [2] 222/16 316/17</p> <p>examined [1] 371/14</p> <p>examinee [2] 370/24 408/10</p> <p>examiner [9] 370/19 371/14 371/15 385/13 396/19 406/22 407/1 407/6 409/13</p> <p>examiners [3] 384/18 407/9 411/4</p> <p>examining [4] 259/7 407/10 415/25 416/3</p> <p>example [24] 224/14 227/5 228/23 232/12 235/25 239/20 243/1 247/17 250/7 272/8 281/10 281/11 281/14 286/6 309/8 343/5 343/22 343/23 350/18 362/4 389/4 405/13 408/14 410/11</p> <p>examples [4] 248/14 262/14 358/18 358/25</p> <p>excellent [1] 301/12</p> <p>except [1] 361/13</p> <p>exception [2] 362/10 409/2</p> <p>excerpt [1] 254/20</p> <p>exchanges [1] 278/25</p> <p>exclude [1] 350/7</p> <p>exclusion [4] 350/16 350/16 350/21 350/24</p> <p>exclusions [1] 348/16</p> <p>exclusive [1] 251/15</p> <p>excuse [8] 233/22 261/8 266/3 271/16 327/13 353/7 374/3 422/7</p> <p>excused [1] 424/21</p> <p>excuses [4] 265/4 265/21 265/24 266/20</p> <p>Executing [1] 279/5</p> <p>Executive [1] 288/16</p> <p>exercise [1] 301/11</p> <p>exercised [1] 399/10</p> <p>exercises [1] 307/6</p> <p>exerting [2] 244/6 245/8</p> <p>exhibit [105] 221/11 229/1 229/2 229/4 229/8 229/18 229/19 229/24 230/1 232/16 232/20 232/25 233/2 234/5 234/7 237/5 238/7 238/12 238/15 238/17 240/17 240/22 240/23 241/3 241/8 241/17 243/20 243/25 244/2 245/24 246/4 246/6 248/20 250/22 250/25 251/2 253/15 253/16 253/17 253/20 253/22 253/24 255/1 255/2 255/3 258/6 258/19 259/3 259/8 260/4 260/7 264/11 264/12 267/17 267/17 267/19 267/21 270/17 270/18 270/24 271/1 272/14 276/9 276/12 276/12 276/18 276/20 282/16 283/23 284/2 284/4 290/13 302/10 303/21 303/25</p>	<p>304/10 305/16 310/19 310/20 310/23 310/11 313/7 313/11 316/23 317/1 317/5 317/7 319/6 319/9 319/11 327/15 327/16 327/18 327/20 332/7 351/16 351/17 352/21 354/11 356/15 356/24 357/1 357/3 360/18 366/2</p> <p>Exhibit 1 [2] 229/18 229/24</p> <p>Exhibit 2 [4] 237/5 238/7 238/12 238/15</p> <p>Exhibit 2A [3] 240/17 240/22 241/8</p> <p>Exhibit 3 [1] 243/20</p> <p>Exhibit 37 [1] 327/18</p> <p>Exhibit 39 [2] 232/16 232/25</p> <p>Exhibit 4 [2] 245/24 246/4</p> <p>Exhibit 5 [2] 250/22 250/25</p> <p>Exhibit 50 [2] 255/2 332/7</p> <p>Exhibit 5180 [1] 253/15</p> <p>Exhibit 7 [3] 253/17 253/20 253/24</p> <p>Exhibit B [1] 360/18</p> <p>Exhibit E [2] 356/15 356/24</p> <p>exhibits [12] 221/7 221/9 229/5 229/6 229/14 251/6 251/21 302/25 303/17 303/21 428/8 428/14</p> <p>exist [4] 343/18 346/17 350/21 379/23</p> <p>existence [2] 385/17 387/22</p> <p>exists [1] 365/19</p> <p>expand [2] 250/1 388/7</p> <p>expanding [1] 386/12</p> <p>expansive [1] 396/12</p> <p>expect [5] 257/19 344/18 401/2 401/3 426/21</p> <p>expected [3] 363/10 396/11 401/7</p> <p>expensive [1] 316/22</p> <p>experience [12] 322/10 322/14 322/16 323/7 337/22 355/18 355/19 390/11 392/9 415/24 415/24 419/16</p> <p>expert [5] 340/11 340/17 346/1 355/22 385/4</p> <p>expert's [1] 423/19</p> <p>experts [9] 220/25 255/20 330/24 338/25 339/8 339/9 341/4 378/6 384/23</p> <p>experts' [1] 330/20</p> <p>explain [9] 243/13 264/25 280/13 280/14 345/18 350/3 379/3 380/14 380/24</p> <p>explained [1] 314/10</p> <p>explaining [8] 231/15 232/9 243/2 244/19 265/21 266/19 376/9 396/14</p> <p>explains [4] 247/3 307/17 385/2 385/4</p> <p>explanation [6] 245/12 245/13 247/5 296/12 348/7 361/17</p> <p>exploitable [1] 398/23</p> <p>explore [3] 287/10 348/22 376/6</p> <p>explored [2] 359/4 374/3</p> <p>exposed [5] 393/24 394/12 400/23 401/25 402/16</p> <p>exposure [5] 363/10 382/19 385/25 399/23 399/25</p> <p>expounds [2] 242/11 246/13</p> <p>express [1] 248/12</p> <p>expressed [2] 273/7 391/25</p> <p>expresses [1] 268/25</p> <p>expressing [1] 269/1</p>	<p>extended [1] 331/2</p> <p>extent [2] 256/4 384/8</p> <p>extra [1] 313/9</p> <p>extraction [1] 224/12</p> <p>extremely [1] 416/7</p> <p>eyes [4] 238/24 239/4 239/7 239/21</p> <p>F</p> <p>F-L-Y-N-N [1] 353/13</p> <p>face [7] 235/10 277/9 277/9 282/3 284/19 289/15 322/18</p> <p>face-to-face [1] 277/9</p> <p>Facebook [12] 230/8 295/4 295/9 295/10 297/3 297/4 297/6 297/7 297/19 297/22 315/18 315/19</p> <p>facile [2] 360/15 362/9</p> <p>facilities [2] 256/12 312/4</p> <p>facility [2] 322/19 403/4</p> <p>Facsimile [1] 219/19</p> <p>fact [49] 223/15 225/12 226/10 253/12 261/9 267/5 269/9 283/11 285/15 287/22 295/24 299/5 300/2 300/10 307/9 309/24 309/25 311/8 314/14 315/18 318/15 320/1 322/4 322/9 323/7 325/13 331/3 334/7 334/24 336/11 340/15 344/21 347/21 348/1 348/3 350/6 362/18 362/25 363/3 375/3 375/7 376/11 377/18 377/24 396/9 399/5 420/17 420/25 422/22</p> <p>factor [5] 288/4 348/19 376/24 382/25 398/15</p> <p>factors [3] 368/10 371/24 415/14</p> <p>fail [1] 247/14</p> <p>failure [1] 386/19</p> <p>fair [9] 285/24 291/7 291/9 345/9 387/23 388/5 392/14 392/15 416/2</p> <p>fairly [2] 389/2 398/20</p> <p>faith [1] 284/13</p> <p>fall [4] 235/10 284/18 284/21 289/15</p> <p>falling [1] 236/15</p> <p>falls [1] 289/9</p> <p>familiar [3] 226/22 235/20 266/8</p> <p>family [6] 271/8 291/13 330/25 331/1 331/2 331/9</p> <p>famous [1] 246/10</p> <p>far [12] 255/8 293/2 301/5 303/14 308/4 329/6 334/3 334/16 349/8 382/3 410/1 426/5</p> <p>fashion [4] 227/17 227/18 247/18 344/3</p> <p>fast [1] 233/19</p> <p>father [1] 391/10</p> <p>featured [1] 386/7</p> <p>February [2] 403/3 404/10</p> <p>February 15th [1] 404/10</p> <p>fed [2] 221/15 221/22</p> <p>feel [8] 233/9 233/13 233/15 235/6 235/12 239/6 271/14 271/21</p> <p>feeling [1] 268/3</p> <p>feelings [5] 235/15 235/16 269/1 279/9 396/16</p> <p>feels [1] 269/18</p> <p>feet [4] 268/16 269/21 315/5 315/13</p> <p>felt [2] 341/10 396/12</p>
---	--	--	--

<p>F</p> <p>fetal [1] 382/19</p> <p>few [14] 254/22 267/5 268/18 284/7 293/21 302/6 302/7 332/3 338/22 388/13 388/18 419/1 419/2 419/3</p> <p>field [1] 247/21</p> <p>fifteen [1] 393/3</p> <p>fifteen-minute [1] 393/3</p> <p>fifth [2] 226/6 387/2</p> <p>Fifty [1] 332/6</p> <p>Fighting [1] 271/5</p> <p>figure [1] 221/22</p> <p>file [2] 298/25 408/2</p> <p>fill [4] 322/9 323/14 323/21 323/22</p> <p>filled [3] 324/12 324/14 403/24</p> <p>filling [2] 324/3 324/8</p> <p>final [1] 294/16</p> <p>finally [1] 334/16</p> <p>find [7] 221/24 233/13 310/1 310/2 310/3 310/4 348/4</p> <p>finder [1] 360/19</p> <p>finding [1] 347/21</p> <p>fine [4] 221/25 233/7 234/8 302/19</p> <p>finish [3] 222/8 285/5 425/12</p> <p>finished [4] 227/24 285/9 349/14 380/19</p> <p>first [30] 222/6 222/20 244/5 246/9 261/19 263/20 263/23 268/19 276/24 287/24 321/16 324/7 324/12 333/3 334/16 334/18 344/6 360/11 365/13 366/4 367/15 379/10 384/2 385/16 397/24 402/25 406/19 408/21 411/18 418/14</p> <p>first-grade [1] 344/6</p> <p>fit [2] 278/16 391/19</p> <p>five [5] 340/22 372/19 372/22 417/5 417/25</p> <p>Flags [1] 305/17</p> <p>flaw [1] 372/23</p> <p>Floor [1] 219/7</p> <p>fluency [1] 362/4</p> <p>fluid [1] 363/13</p> <p>Flynn [22] 352/5 352/13 352/15 352/19 353/7 353/13 353/13 357/9 358/5 358/9 364/23 365/7 365/15 365/22 365/24 367/9 367/11 367/20 367/24 368/2 368/9 422/8</p> <p>Flynn's [2] 357/11 424/9</p> <p>Flynnings [1] 367/17</p> <p>focus [5] 246/9 267/24 289/1 329/2 393/22</p> <p>focused [3] 255/9 284/12 284/12</p> <p>folks [2] 369/17 401/13</p> <p>folks' [1] 334/5</p> <p>follow [4] 225/2 249/8 377/15 405/2</p> <p>follow-up [1] 377/15</p> <p>followed [2] 412/20 413/25</p> <p>follower [1] 336/19</p> <p>follows [1] 332/18</p> <p>food [2] 221/25 257/7</p> <p>force [3] 235/11 235/18 246/16</p> <p>foregoing [1] 427/10</p> <p>foreman [1] 280/18</p> <p>forensic [1] 339/23</p> <p>forever [1] 349/1</p> <p>forget [3] 272/1 334/4 384/11</p>	<p>forgotten [1] 258/15</p> <p>form [14] 253/4 253/5 300/11 378/6</p> <p>formal [2] 363/17 404/7</p> <p>formation [2] 397/4 397/13</p> <p>formed [3] 249/13 296/15 309/23</p> <p>former [1] 331/1</p> <p>forming [2] 279/11 356/19</p> <p>forth [7] 286/14 290/4 292/19 353/8 354/25 356/7 392/2</p> <p>Forty [1] 304/5</p> <p>Forty-two [1] 304/5</p> <p>forward [5] 249/4 252/1 284/6 320/12 334/23</p> <p>Foster [1] 279/11</p> <p>found [2] 290/22 310/5</p> <p>foundation [6] 236/4 302/18 375/14 375/17 423/23 423/24</p> <p>four [12] 287/18 298/1 321/9 329/8 396/19 397/2 397/10 397/17 397/18 411/12 412/2 425/21</p> <p>four-year-old [1] 298/1</p> <p>fourth [2] 226/8 387/1</p> <p>frames [1] 318/1</p> <p>Francisco [1] 219/2</p> <p>Frank's [1] 300/23</p> <p>Franks [4] 383/10 386/8 394/19 396/2</p> <p>free [1] 311/4</p> <p>frequently [5] 339/17 339/18 339/19 340/19 419/21</p> <p>friend [2] 297/6 297/8</p> <p>friends [3] 279/18 295/1 295/11</p> <p>friendships [1] 279/11</p> <p>front [4] 248/18 248/22 360/24 395/20</p> <p>frontal [1] 382/15</p> <p>full [13] 281/12 344/1 360/3 367/1 367/7 367/14 367/14 386/25 395/4 395/6 404/11 410/21 425/15</p> <p>full-scale [5] 344/1 367/1 367/7 367/14 367/14</p> <p>fully [2] 225/24 233/8</p> <p>function [3] 293/23 339/11 399/12</p> <p>functional [1] 249/1</p> <p>functionally [2] 328/9 328/22</p> <p>functioning [24] 225/15 247/22 248/6 248/7 248/8 268/19 269/10 278/4 281/5 293/20 294/5 294/10 309/21 330/18 330/19 333/7 338/11 344/17 344/18 380/19 382/14 382/22 397/22 398/19</p> <p>functions [1] 370/17</p> <p>funny [2] 250/16 254/13</p> <p>further [10] 230/5 256/6 280/13 280/14 292/25 338/2 368/18 406/4 406/4 424/18</p> <p>future [3] 330/14 335/22 369/1</p> <p>futurized [1] 368/20</p> <p>G</p> <p>game [3] 309/20 309/20 345/9</p> <p>games [6] 309/8 309/11 310/7 310/10 310/14 311/5</p> <p>GARAUFIS [4] 218/11 220/5 220/6 327/1</p> <p>gas [1] 312/3</p> <p>Gates [2] 252/11 252/20</p> <p>gather [1] 420/24</p>	<p>gathered [1] 293/23</p> <p>general [2] 298/23 255/21 262/14 296/20 301/8 307/13 395/3 408/20 410/17 411/5 411/11 412/14 413/22</p> <p>general [8] 312/1 337/14 337/20 363/11 397/3 397/11 399/22 424/16</p> <p>generalization [1] 224/11</p> <p>generalized [1] 225/7</p> <p>generally [1] 224/20</p> <p>generated [1] 414/10</p> <p>generation [1] 390/8</p> <p>gentlemen [1] 334/5</p> <p>George [1] 340/6</p> <p>gesture [1] 268/8</p> <p>get [56] 221/22 221/25 222/8 222/12 222/20 225/20 230/4 233/6 233/15 236/2 239/19 240/18 243/12 245/12 264/4 265/22 268/15 269/9 271/25 274/8 277/12 284/9 284/13 285/1 286/23 288/1 289/2 290/20 292/6 295/22 296/11 296/11 300/19 301/6 307/15 315/12 315/19 317/15 317/18 319/15 320/4 334/10 334/10 335/24 336/3 352/6 352/23 353/8 391/5 400/17 407/4 416/23 425/11 426/5 426/7 426/12</p> <p>get-go [1] 290/20</p> <p>gets [6] 264/5 269/21 315/11 371/21 371/22 423/25</p> <p>getting [14] 230/14 231/3 236/7 297/3 299/25 309/3 314/14 315/4 330/13 334/6 337/6 373/17 377/11 383/19</p> <p>Giglio [1] 426/1</p> <p>gild [1] 383/23</p> <p>Gilio [2] 400/10 401/11</p> <p>girl [3] 254/7 277/1 277/6</p> <p>girl's [1] 282/3</p> <p>girlfriend [6] 279/17 298/14 298/15 298/18 331/1 331/6</p> <p>girls [1] 308/16</p> <p>gist [1] 373/15</p> <p>give [27] 224/17 229/6 235/9 238/4 251/19 257/15 271/7 276/12 281/18 290/19 293/8 317/11 331/22 339/16 343/22 372/3 386/12 395/4 395/5 410/18 410/21 410/22 410/25 412/5 414/2 414/7 414/20</p> <p>given [27] 222/16 256/7 344/9 344/18 345/9 368/12 370/11 372/10 372/11 376/3 377/18 377/24 382/16 383/6 383/11 383/16 385/12 385/22 398/6 402/2 402/15 407/13 411/1 412/9 414/2 414/3 426/5</p> <p>gives [3] 336/2 336/15 385/14</p> <p>giving [15] 226/13 255/25 265/21 279/13 289/5 290/22 291/10 292/9 308/6 317/18 351/22 385/10 396/24 408/10 411/25</p> <p>glasses [3] 317/11 317/19 317/24</p> <p>go [78] 222/20 225/6 229/9 230/5 232/3 232/18 235/3 235/12 236/9 238/18 238/22 241/20 245/20 249/4 252/1 253/13 256/10 257/10 259/18 260/15 261/5 264/17 265/18 274/15</p>	<p>277/2 285/24 287/16 287/19 288/5 288/25 291/14 290/20 292/1 293/15 295/25 299/23 302/3 302/13 304/20 306/13 307/4 307/4 311/3 316/5 317/18 317/23 319/14 320/3 322/8 325/16 332/10 333/16 335/3 335/5 338/21 345/10 346/18 349/1 349/18 352/1 356/17 364/15 364/20 367/18 376/7 379/2 379/20 380/3 381/12 382/4 382/7 386/13 386/15 399/18 406/12 413/7 415/18 426/25</p> <p>goal [4] 230/15 231/8 330/11 402/4</p> <p>goals [1] 401/18</p> <p>Gobana [2] 316/17 316/19</p> <p>God [2] 271/17 274/4</p> <p>goes [14] 239/9 242/16 245/10 247/6 273/23 279/24 284/15 292/25 313/24 334/13 342/13 370/7 376/2 378/4</p> <p>going [90] 222/3 222/7 222/14 222/25 224/5 229/1 229/2 230/4 230/11 230/22 232/14 233/4 233/24 236/2 236/10 237/3 238/21 240/6 240/16 241/19 241/20 241/20 244/5 245/20 254/18 254/21 258/19 260/1 268/2 270/16 273/25 274/8 275/9 284/9 284/18 287/9 289/14 294/3 294/19 300/20 301/18 302/6 302/8 302/13 312/10 313/8 315/4 317/21 318/17 320/14 329/6 329/11 329/12 331/22 332/22 337/5 337/19 338/21 346/1 346/20 347/1 349/7 349/14 355/14 358/22 371/6 375/11 375/18 378/9 379/13 379/24 380/2 381/4 381/20 385/1 386/12 388/17 405/21 406/3 406/6 416/11 421/3 423/18 425/2 425/9 425/18 425/21 426/5 426/15 426/22</p> <p>gone [2] 405/22 405/23</p> <p>good [34] 220/16 220/19 222/10 222/19 222/22 223/3 223/4 230/12 230/14 245/2 246/19 254/7 257/9 257/10 258/2 268/17 268/25 280/15 280/17 280/19 281/11 284/12 285/15 299/14 307/2 307/3 333/20 361/13 367/10 389/7 401/23 412/11 424/24 427/3</p> <p>Google [1] 240/3</p> <p>got [39] 221/19 236/10 257/8 261/2 265/5 265/25 285/15 301/4 305/20 305/25 309/2 314/6 314/17 315/12 317/25 320/25 323/24 324/15 331/11 343/8 348/2 348/6 349/10 349/11 357/10 367/6 369/24 372/5 378/21 382/2 387/16 393/25 404/2 405/25 409/22 412/25 414/20 422/5 422/8</p> <p>GOV [6] 251/5 310/21 376/16 395/15 403/25 407/24</p> <p>government [80] 218/13 229/2 229/2 229/3 229/18 229/19 229/24 232/16 232/20 232/25 237/5 238/7 238/11 238/15 240/17 240/22 240/23 241/8 243/19 243/20 243/25 245/23</p>
--	---	---	--

<p>G</p> <p>government... [58] 245/25 246/4 250/22 250/23 250/25 253/15 253/16 253/16 253/17 253/20 253/24 255/2 258/19 259/3 260/7 264/11 264/12 267/16 267/17 267/19 267/21 270/17 270/18 270/24 276/9 276/12 276/18 283/22 284/2 290/13 302/9 303/25 304/10 305/16 310/19 313/8 313/17 316/23 317/1 317/5 319/6 319/9 327/15 327/18 332/7 354/1 355/11 356/7 357/13 364/16 380/7 380/13 381/22 384/14 386/7 389/7 412/16 426/22</p> <p>government's [21] 230/1 233/2 238/17 241/17 244/2 246/6 251/2 251/12 251/15 253/22 259/6 259/8 271/1 276/20 284/4 313/19 317/7 319/11 327/20 380/10 428/14</p> <p>grade [3] 226/6 226/8 344/6 grammar [3] 272/20 272/22 361/5</p> <p>grammatical [1] 234/10 granddaughter [1] 298/1 Grandma [1] 268/17 granting [2] 346/23 346/25 great [5] 303/23 305/17 355/18 363/4 384/8 greater [6] 225/6 284/13 315/8 399/23 399/25 424/14 greatest [2] 273/25 274/21 greatly [1] 357/19 green [12] 313/25 338/15 340/15 352/17 352/18 358/9 359/12 359/22 359/25 360/3 373/22 394/9</p> <p>Greenspan [2] 360/5 360/10 grew [1] 312/10 grocery [1] 311/25 groomed [7] 299/1 300/7 300/12 301/14 301/20 305/13 306/23 grooming [4] 298/10 298/13 299/3 309/2 grossest [1] 415/20 groundwork [1] 347/16 group [7] 279/22 280/6 280/18 313/3 341/1 364/11 425/5 growing [2] 318/15 318/16 guess [4] 248/2 316/21 320/9 373/10 guide [2] 275/10 366/12 guideline [2] 360/6 366/19 gullable [1] 280/2 gullibility [3] 279/24 337/2 337/3 gullible [7] 336/23 336/25 337/4 337/8 337/9 337/14 337/16 guys [1] 306/17</p>	<p>359/4 361/13 364/7 366/7 372/11 374/21 375/13 375/21 375/25 376/11 377/14 377/24 377/25 378/11 378/15 380/3 381/19 384/18 384/24 385/5 385/8 386/5 388/2 391/8 394/1 394/1 400/11 404/21 406/9 406/19 407/17 407/18 407/18 409/12 409/16 409/22 410/12 410/13 411/7 411/10 413/24 hair [2] 301/10 302/2 half [8] 221/20 257/18 367/15 393/1 393/2 399/19 402/22 425/23 half-hour [1] 257/18 hand [5] 229/9 229/12 240/23 302/8 398/1 Handing [10] 243/22 246/1 267/18 276/14 283/23 302/10 313/9 317/1 327/15 353/24 handle [4] 271/18 271/21 274/5 308/17 handling [1] 329/3 handsome [1] 301/9 handwriting [1] 413/10 handwritten [1] 404/15 hang [2] 307/14 307/14 happen [3] 228/15 282/7 354/12 happened [2] 293/18 420/15 happening [3] 286/18 293/10 321/16 happens [3] 365/20 371/11 416/25 happiest [2] 238/25 239/23 hard [2] 331/23 370/21 has [84] 221/18 221/20 221/24 222/13 222/16 226/15 229/3 229/14 230/20 234/21 236/4 238/6 240/10 243/20 245/23 249/6 249/7 249/16 253/16 254/24 255/3 255/10 256/7 269/25 272/20 282/12 282/14 283/22 284/14 286/18 287/20 289/3 292/12 292/17 293/18 293/23 302/17 306/17 314/11 316/16 319/17 324/2 324/7 327/22 329/15 336/11 338/10 338/13 343/10 343/11 343/12 344/1 344/16 347/12 355/18 355/20 357/8 358/15 364/4 364/20 366/15 369/13 373/22 379/5 379/11 382/14 382/22 386/13 388/18 388/22 390/11 390/25 393/23 394/1 394/12 402/2 402/9 403/14 403/15 415/15 415/22 417/6 426/18 426/22 hasn't [1] 385/20 haunt [1] 271/19 have [301] haven't [2] 241/9 269/3 having [14] 281/24 285/2 286/24 287/8 291/22 292/19 293/2 337/7 337/11 360/5 361/15 388/13 390/23 405/7 he [433] he'll [1] 222/8 he's [112] 227/24 230/21 230/22 231/14 231/14 231/16 231/20 235/16 235/17 242/9 244/12 245/4 245/20 245/21 247/3 247/8 252/22 254/9 254/12 257/9 257/11 257/24 261/9 261/11</p>	<p>261/12 262/7 262/8 263/10 266/19 266/19 266/19 269/1 269/15 269/18 270/2 270/12 271/12 272/11 273/8 274/6 275/8 275/10 275/11 277/5 277/22 279/21 282/3 285/3 285/18 285/18 285/21 286/7 289/12 289/17 289/18 290/22 302/3 305/9 305/25 317/18 320/2 329/12 329/16 333/23 333/24 335/4 335/15 335/17 335/18 335/22 335/24 336/18 336/23 336/23 336/24 336/24 336/25 345/15 345/19 346/13 348/2 348/6 355/19 358/15 367/5 380/2 385/13 385/19 385/25 387/11 387/15 387/16 389/6 390/21 390/23 394/12 394/13 396/4 396/9 396/24 398/6 398/8 402/11 404/17 405/7 405/25 414/20 425/23 head [8] 246/18 247/13 289/14 305/21 314/3 314/19 314/21 319/2 heading [1] 346/5 health [6] 320/18 320/18 341/9 374/12 374/15 374/20 hear [24] 223/11 230/12 234/9 259/14 261/10 261/16 261/20 262/3 264/21 266/21 270/21 285/12 290/14 297/16 307/23 316/18 320/11 330/6 331/23 335/6 335/15 346/19 347/19 354/1 heard [10] 231/24 232/11 261/11 285/21 292/18 292/23 329/16 335/2 382/2 384/2 hearing [9] 218/11 220/8 236/3 261/18 303/12 303/14 357/8 386/18 419/24 hears [1] 273/10 heart [1] 305/6 help [7] 235/10 245/12 264/19 264/23 291/13 319/15 390/9 helpful [1] 423/20 helping [1] 320/15 Henry [2] 273/24 273/24 her [63] 234/5 234/9 239/3 239/4 239/4 239/4 239/6 239/7 242/1 242/12 242/13 247/13 268/11 269/21 271/22 274/2 277/5 284/19 290/22 291/13 291/13 291/13 291/16 291/16 291/19 291/19 293/6 293/6 297/18 297/21 297/22 319/16 320/3 320/12 320/14 320/15 331/7 331/25 333/17 333/18 333/23 333/24 334/13 334/15 335/24 335/24 336/2 336/7 336/7 336/15 391/10 391/10 402/6 411/19 413/9 422/1 422/2 422/17 422/18 422/20 422/22 426/7 426/17 here [76] 221/25 231/2 231/20 233/15 233/17 235/2 235/7 242/3 244/5 246/9 247/23 265/3 266/11 269/2 270/8 271/7 271/20 273/19 274/9 274/18 274/21 281/1 283/5 284/7 284/20 286/22 292/15 301/7 305/5 306/22 306/22 309/3 310/22 314/4 314/10 315/25 317/9 317/11 320/2 320/10 321/11 328/4 329/2 331/10</p>	<p>331/17 336/14 337/18 345/25 346/18 346/18 347/22 349/1 364/7 366/24 375/14 381/8 381/12 383/23 384/6 386/11 391/17 392/21 397/18 399/14 400/19 407/17 416/1 418/7 419/10 419/14 419/22 419/25 422/22 424/6 425/1 426/4 hers [1] 272/3 herself [1] 293/3 hesitate [1] 281/18 hesitating [1] 344/13 hey [7] 244/24 281/5 284/25 289/13 294/9 320/10 348/6 high [6] 243/9 243/9 249/23 249/24 301/5 418/3 high-level [1] 249/23 higher [13] 223/21 227/12 248/25 250/11 252/17 286/3 288/18 290/10 290/11 308/24 309/21 310/9 420/3 highest [1] 310/13 highest-level [1] 310/13 highlighted [1] 361/2 highlights [1] 338/23 highly [3] 255/14 401/24 423/15 him [86] 221/19 221/22 221/25 222/1 222/5 222/12 222/20 239/6 242/12 246/21 252/10 254/5 254/5 257/9 261/11 261/15 262/15 262/18 262/21 265/10 265/10 269/22 273/24 280/18 283/14 285/5 292/9 293/15 293/22 294/23 296/20 296/20 297/19 297/22 301/19 307/13 307/13 312/19 316/5 316/8 318/25 320/10 322/19 322/22 322/23 323/22 323/22 327/25 329/4 335/2 342/1 344/15 345/5 345/6 345/16 347/7 347/8 349/18 350/6 355/23 373/11 373/13 375/18 378/21 379/2 379/3 379/8 381/12 385/3 385/14 386/4 390/9 390/19 394/1 394/14 396/24 400/20 401/9 402/25 403/7 408/20 414/15 414/17 414/22 420/24 423/19 himself [10] 240/6 253/10 280/24 301/20 301/25 315/18 317/24 318/17 322/10 364/4 his [165] 221/17 222/1 227/24 231/25 232/1 235/15 235/16 236/18 242/13 244/22 244/24 247/13 254/12 262/9 264/4 266/19 267/9 269/15 270/12 271/12 272/5 272/11 272/20 273/7 273/12 275/10 279/16 279/17 280/10 280/15 280/19 281/1 281/2 281/17 285/5 286/7 293/11 293/18 293/22 293/24 296/18 297/21 298/3 298/14 298/18 298/20 298/22 299/3 299/3 299/4 299/12 299/14 299/16 299/19 300/1 300/10 300/10 301/10 301/10 301/11 302/2 305/21 305/23 305/25 306/6 306/8 306/15 308/1 311/4 312/9 312/14 312/17 314/16 316/4 317/10 317/18 317/19 318/10 318/11 318/24 319/13 319/24 320/20 321/20 321/23 322/5 322/10 322/14 323/6 323/7 323/19 325/7 329/4 331/1 331/1</p>
<p>H</p> <p>had [77] 220/25 223/7 230/22 231/24 232/1 232/18 247/13 258/4 258/14 271/9 280/15 292/23 294/7 294/11 296/17 299/9 299/14 299/16 301/20 306/15 310/5 312/24 316/16 317/16 322/13 344/7 345/14 346/11 347/8 349/25 352/2 352/3 354/15 355/18 355/23 356/14</p>			

<p>his... [70] 331/2 331/6 334/1 334/21 334/24 335/3 335/15 338/17 344/16 344/18 344/19 345/3 345/10 345/11 345/16 346/12 348/12 348/14 350/25 351/2 351/2 355/21 356/3 357/6 358/18 358/18 361/21 369/11 370/7 371/20 375/3 375/4 378/3 379/6 379/6 380/23 382/16 383/9 383/11 384/18 385/22 386/5 389/5 389/8 390/8 390/13 390/15 390/16 390/22 391/25 393/24 394/2 394/16 395/1 395/17 396/3 396/9 397/15 398/21 398/24 399/7 399/10 399/10 399/13 402/2 402/6 402/10 403/7 410/2 424/12 historical [1] 415/9 history [14] 282/1 296/11 322/13 339/3 362/3 363/5 378/20 382/16 385/22 388/18 388/20 403/8 403/14 404/3 hit [1] 338/22 hold [2] 265/9 291/3 home [12] 246/18 247/13 299/7 320/17 320/19 320/20 320/24 320/25 322/1 322/5 351/25 352/1 HON [1] 218/11 honesty [2] 240/11 241/25 Honor [84] 220/16 220/24 221/6 227/25 229/3 229/17 232/17 232/22 232/24 233/22 236/6 238/19 240/15 240/24 241/14 243/24 244/3 246/3 246/7 251/3 251/10 251/22 252/7 254/17 254/25 255/4 255/14 256/11 257/17 259/2 259/21 260/17 261/1 264/10 267/20 283/3 283/20 284/1 285/6 290/14 302/8 302/12 303/16 306/12 313/7 313/16 317/4 319/8 325/19 326/6 326/8 327/17 332/9 335/9 337/25 344/22 345/14 346/4 352/24 353/25 354/4 354/12 356/16 356/23 356/25 375/11 378/2 379/10 380/16 382/5 383/18 384/15 385/7 392/24 405/21 406/5 412/6 418/8 419/1 423/21 424/18 424/20 427/1 427/2 Honorable [3] 220/5 220/6 327/1 hope [4] 268/13 271/14 357/8 386/13 hoping [2] 371/6 371/8 hospital [7] 282/6 339/13 376/16 376/17 383/3 383/6 403/15 hospitalization [3] 377/6 378/17 403/16 hospitalizations [1] 378/12 hotel [3] 352/1 386/14 420/17 hour [7] 221/20 257/18 257/21 326/5 393/1 393/2 426/9 hourly [1] 261/3 hours [8] 221/21 325/23 338/7 338/21 358/25 383/20 384/11 425/21 house [1] 287/19 household [1] 300/2 housekeeping [1] 220/24 how [79] 221/22 225/6 228/14 230/19 233/9 233/21 234/15</p>	<p>235/8 236/2 236/5 237/14 242/2 242/18 247/14 257/15 260/20 262/8 263/6 268/8 272/10 272/12 284/21 290/7 294/3 294/9 296/21 297/4 301/20 311/13 323/22 325/13 325/17 329/11 329/12 329/13 329/15 329/16 330/11 333/25 334/23 339/1 343/2 343/8 343/10 344/9 345/8 367/11 367/17 367/17 370/13 376/4 376/4 378/8 378/14 378/14 379/4 380/2 380/15 383/24 387/7 388/17 388/21 391/4 391/5 392/16 393/23 399/15 399/18 399/20 406/16 408/21 415/20 417/6 423/13 425/18 426/4 426/5 426/8 426/10 however [4] 268/8 286/23 371/10 395/8 Hudson [1] 219/7 hum [3] 275/11 300/15 418/17 human [3] 291/23 293/8 392/1 humor [6] 249/9 249/22 249/23 250/4 253/2 259/23 hurt [1] 425/11 hurts [2] 233/17 235/8 hurts when [1] 233/17 hygiene [7] 298/10 298/23 300/1 300/25 301/12 308/1 315/2 hyperactivity [1] 342/4 hypothetically [1] 236/16</p> <p>I</p> <p>I'd [8] 229/11 325/25 332/2 344/14 346/2 376/6 388/9 388/9 I'll [16] 222/20 232/12 235/2 254/10 264/25 277/4 284/9 307/18 307/19 335/1 349/5 349/17 349/18 386/10 406/11 406/11 I'm [142] 221/23 222/1 222/2 222/3 222/14 223/11 224/17 224/19 226/22 227/18 227/18 229/1 230/4 230/21 232/14 232/15 233/4 233/10 233/15 236/9 237/3 237/4 237/11 237/17 238/11 238/21 239/10 240/16 241/19 241/20 241/20 242/3 244/9 244/15 244/17 245/7 245/9 245/11 248/23 250/1 253/1 253/1 254/7 258/14 260/1 261/11 261/18 263/22 266/6 266/21 268/2 268/13 268/25 270/21 271/3 271/18 272/13 272/25 274/12 274/17 276/8 276/11 276/12 276/13 277/2 277/20 281/17 285/2 285/6 292/5 295/7 299/25 301/3 302/6 302/8 303/25 304/13 304/15 305/24 307/23 311/11 314/25 316/6 316/18 318/3 318/7 319/18 319/22 319/23 321/13 325/7 325/9 325/22 330/6 330/11 331/22 333/5 333/18 337/7 337/10 338/21 344/13 345/7 345/20 347/11 348/21 348/24 349/12 352/6 354/1 354/2 358/22 359/4 359/17 365/5 367/13 370/6 373/10 375/11 375/18 380/12 380/14 380/23 381/17 384/3 386/3 386/3 386/11 386/12 392/21 392/22 392/24 401/12 405/21 406/5 406/6 412/25</p>	<p>414/16 423/18 424/5 425/1 426/4 426/8 426/15 427/14 427/20 427/22 251/17 293/21 302/8 313/9 333/9 349/15 352/21 356/14 364/15 364/17 382/2 382/2 384/1 ID [4] 341/1 346/8 346/9 360/5 idea [5] 237/7 253/5 307/20 333/25 388/21 ideas [1] 337/21 identification [1] 260/9 identified [2] 220/25 348/20 identify [1] 415/18 identifying [1] 348/18 ideology [1] 232/5 if's [1] 294/23 II [2] 398/18 399/7 III [12] 353/21 353/21 355/6 357/10 357/10 357/12 357/14 357/15 357/21 357/21 422/21 423/1 illegal [4] 325/5 325/7 325/8 325/9 illegitimate [1] 361/18 illiterate [12] 225/16 225/18 225/19 225/20 227/10 228/7 328/6 328/8 328/9 328/16 328/22 328/24 illness [2] 342/14 342/18 illnesses [1] 342/23 illuminating [1] 356/1 imagine [1] 250/18 immaculate [1] 321/24 immediately [1] 332/18 impact [1] 394/1 impaired [2] 388/16 399/19 impeach [1] 423/19 implication [1] 338/24 implied [3] 263/15 263/16 392/3 imply [3] 269/1 376/3 387/20 importance [1] 342/2 important [21] 235/24 262/24 294/14 295/19 296/9 296/23 307/22 307/25 308/21 308/23 311/12 313/5 329/16 347/5 373/18 373/19 406/18 416/7 417/9 424/15 426/18 impossible [1] 292/20 impression [1] 400/10 impropriety [1] 338/25 improve [3] 364/2 364/4 383/12 improved [1] 364/7 improvement [1] 399/24 improving [1] 386/6 impulsive [2] 270/5 270/8 inability [3] 267/2 298/3 300/1 inappropriate [1] 306/2 incapacities [1] 418/23 incarcerated [5] 313/25 324/11 324/13 358/16 358/21 incarceration [1] 324/16 incentive [1] 347/8 incident [1] 316/6 inclined [1] 344/15 include [2] 248/15 350/16 includes [1] 337/20 including [6] 340/1 340/3 340/6 382/19 385/24 400/23 inclusion [1] 416/15 income [1] 329/6 incomplete [4] 245/10 350/2 374/4 386/22 inconsistent [3] 399/1 402/1 402/14</p>	<p>incorporate [2] 228/15 231/24 incorrectly [2] 244/21 277/19 incorrectness [1] 412/24 indecision [1] 247/16 indeed [2] 344/24 353/4 independent [5] 248/1 340/13 402/5 402/12 420/7 independently [2] 402/21 420/10 indicate [6] 249/6 300/7 311/3 346/12 372/2 376/10 indicated [8] 225/15 261/15 268/9 279/15 298/12 395/2 398/3 420/9 indicates [3] 355/3 372/19 412/8 indicating [6] 246/9 346/21 397/18 410/12 411/8 411/11 indication [1] 400/13 indicator [2] 322/1 387/21 indicia [1] 388/3 individual [2] 342/17 379/14 individual's [3] 294/2 363/11 363/19 individualized [1] 340/20 individuals [5] 223/15 340/24 357/22 370/19 415/25 infant [1] 368/17 infer [1] 360/4 inference [3] 387/15 387/16 390/18 inferring [2] 361/2 362/2 influence [1] 368/10 influences [3] 393/23 394/1 394/12 influential [1] 375/8 information [49] 225/23 226/3 248/12 249/18 253/6 273/8 293/23 296/4 296/17 302/20 303/9 303/11 313/12 320/12 320/14 321/1 323/3 328/21 330/18 330/25 331/11 340/13 346/12 349/24 349/25 351/22 355/24 356/1 356/11 360/7 360/8 363/7 363/11 363/14 374/20 376/9 376/11 378/5 384/22 385/2 385/5 385/16 395/1 397/10 399/24 403/19 404/5 406/9 413/4 information-processing-based [1] 363/14 informational [1] 361/7 informed [1] 303/6 infrequent [1] 283/10 infrequently [1] 266/7 inherent [2] 255/19 288/10 initial [1] 403/8 initially [1] 367/13 initiative [1] 329/20 injury [1] 375/3 inmates [2] 280/22 311/13 input [1] 339/15 inquiry [2] 355/25 378/17 inside [2] 239/6 275/23 insight [1] 362/5 inspect [1] 408/15 instance [23] 233/25 234/15 262/5 263/6 281/4 281/8 285/14 297/13 297/23 299/9 306/23 308/10 316/3 317/13 317/21 330/3 343/2 366/15 369/22 370/23 371/20 384/23 408/5 instances [2] 250/5 281/12 instantly [1] 263/9</p>
---	---	---	--

I	instead [2] 337/5 409/12 institution [3] 315/9 315/11 400/14 institutionalized [2] 314/20 315/10 instrument [9] 366/3 366/4 366/7 366/25 367/4 367/4 396/22 408/6 423/6 instruments [7] 339/10 353/20 365/13 366/23 366/24 372/12 423/7 insufficiently [1] 374/3 insure [1] 420/4 intake [1] 300/10 integrating [1] 315/8 intellect [4] 275/24 288/9 288/9 296/24 intellectual [66] 223/21 247/19 255/9 282/12 282/15 282/15 287/6 287/21 298/5 309/21 338/11 339/1 339/13 340/21 341/4 342/3 342/10 342/15 342/18 342/23 343/1 343/3 343/4 343/6 343/10 343/19 344/11 344/15 345/16 346/23 346/24 347/9 347/13 347/22 348/17 350/5 350/8 350/20 350/22 359/7 363/22 364/2 369/17 371/7 373/13 373/14 375/6 376/24 382/25 383/16 384/3 384/19 385/1 385/3 387/22 387/25 388/4 390/15 397/22 398/19 399/2 401/5 402/15 415/23 416/13 417/16 intellectually [5] 338/8 398/20 399/19 400/8 405/20 intelligence [5] 365/17 396/20 398/13 415/12 415/12 interact [1] 248/4 interacting [2] 279/2 311/14 interaction [4] 279/3 279/16 390/22 396/5 interactional [1] 290/3 interactions [3] 290/1 294/2 399/11 interdisciplinary [2] 341/1 341/11 interest [1] 331/10 interesting [5] 334/20 355/13 362/18 362/24 363/3 internationally [1] 355/17 internet [1] 240/1 interpersonal [10] 278/21 278/24 280/11 280/21 281/2 281/24 289/10 290/1 294/17 298/3 interplaying [1] 370/18 interpret [2] 275/12 382/13 interpretation [7] 234/12 244/22 244/24 245/3 262/10 365/18 415/7 interpreted [1] 238/1 interpreting [2] 245/5 293/10 interview [6] 294/1 362/5 395/18 395/25 396/10 396/19 interviewed [1] 311/13 interviews [2] 363/16 363/21 introduced [1] 251/25 investigate [1] 355/8 involve [1] 359/1 involved [3] 263/15 281/17	340/19 involved [3] 288/9 338/2 330/1 involving [3] 340/10 362/1 378/12 IQ [24] 258/5 258/5 258/10 275/20 288/10 343/16 343/20 343/24 344/2 344/8 344/9 344/19 351/2 351/3 353/12 363/12 363/17 368/20 369/4 369/11 370/3 371/1 395/6 425/24 irrelevant [1] 312/25 is [650] isn't [13] 228/18 231/19 252/14 274/8 292/8 328/22 337/9 374/6 374/13 379/18 392/14 412/1 416/11 isolated [1] 363/15 issue [24] 247/15 277/12 279/24 295/11 299/4 299/4 341/24 342/13 347/11 348/10 348/21 359/6 363/22 364/17 379/20 381/10 381/21 381/22 381/22 384/12 384/15 386/22 415/7 417/7 issues [15] 257/6 280/11 299/6 340/7 341/8 341/9 341/15 384/7 388/11 398/23 414/4 417/2 420/18 420/20 420/23 it [388] it's [139] 221/17 226/14 227/4 227/5 228/10 228/17 229/10 230/12 233/25 234/2 234/3 234/4 234/14 234/18 238/24 239/21 240/19 246/13 247/5 248/7 248/21 249/18 253/2 254/6 254/10 255/19 255/19 258/8 260/8 260/19 260/21 260/22 261/2 261/18 268/6 269/2 269/6 269/6 271/17 271/21 272/22 272/22 272/23 274/4 277/8 278/6 278/16 279/6 279/6 281/6 283/10 284/19 286/19 286/21 290/3 291/9 292/5 292/19 292/24 293/8 295/19 296/9 297/1 297/7 297/15 298/4 302/4 304/16 307/2 307/3 307/25 308/10 308/23 316/19 316/21 318/6 318/8 322/17 327/14 328/23 329/4 331/23 332/18 338/14 340/12 341/6 344/2 344/13 344/23 345/3 345/4 345/8 345/9 345/10 345/21 345/23 347/14 347/18 349/8 349/19 350/2 353/12 356/15 364/17 365/16 365/16 366/12 367/15 369/17 369/18 370/21 375/19 379/19 380/5 381/19 383/10 384/15 385/11 385/15 385/17 387/24 388/15 390/8 399/3 399/5 401/6 402/2 404/2 406/3 406/6 406/11 406/12 411/16 412/18 415/10 418/8 423/2 423/20 425/21 items [1] 368/19 its [3] 386/7 402/4 418/15 itself [2] 234/5 380/21 IV [1] 350/18	422/11 422/25 423/15 January 25th [1] 403/11 jersey [1] 305/6 job [12] 280/15 280/17 280/19 322/9 323/14 323/21 323/22 324/3 324/8 324/12 324/14 324/25 jobs [1] 322/21 John [1] 271/5 Johnson [3] 219/18 219/20 427/14 joint [1] 271/4 joke [13] 250/7 252/12 252/14 252/14 252/15 253/1 253/2 253/7 262/5 263/7 265/24 265/25 266/20 jokes [3] 250/9 250/11 250/14 joking [1] 252/17 joy [1] 268/6 judge [5] 218/12 314/14 342/13 349/14 417/21 judging [3] 297/10 393/24 394/2 judgment [10] 270/12 336/7 362/7 373/12 373/18 373/23 373/25 374/7 374/24 399/10 Judi [3] 219/18 219/20 427/14 July [2] 233/8 264/14 July 14th [1] 264/14 June [3] 401/21 402/8 402/8 jury [4] 236/4 313/21 383/23 384/6 just [133] 221/24 223/23 226/11 226/13 226/22 228/23 230/12 232/12 232/19 233/8 233/13 234/8 235/3 235/10 236/9 236/16 239/24 241/24 243/10 243/11 248/21 251/3 251/7 252/25 254/21 258/6 258/17 258/24 259/9 261/24 263/18 265/9 271/3 271/24 272/4 272/22 272/22 272/23 276/3 277/2 277/4 277/4 279/6 279/13 281/13 282/22 284/6 284/19 284/19 285/2 285/2 285/7 285/10 288/25 289/20 290/19 292/17 294/7 297/14 297/15 304/1 304/5 304/18 307/19 307/20 310/21 313/6 313/7 314/17 318/5 319/23 320/7 320/17 322/25 325/21 327/11 327/12 328/3 328/11 331/5 331/21 331/22 334/5 337/14 337/18 338/22 345/23 346/8 347/12 347/14 348/2 350/6 352/6 353/8 357/6 366/12 370/10 370/14 371/24 375/6 377/24 379/13 381/1 381/17 381/19 384/1 384/7 384/9 386/11 388/7 390/18 393/13 393/16 400/6 400/16 401/7 401/10 402/10 402/17 404/14 405/21 406/3 415/7 417/6 417/14 419/1 419/2 419/3 419/6 419/6 420/1 420/2 425/1 justification [1] 374/1 juvenile [2] 314/18 322/18 juveniles [1] 314/2	251/3 259/15 271/20 274/19 282/12 284/23 289/18 289/14 292/2 292/6 292/24 294/19 332/21 keeps [1] 321/23 KELTAR [2] 219/12 220/14 key [4] 266/11 317/23 357/21 405/17 kid [2] 242/1 405/7 kid's [1] 371/2 kids [3] 242/1 242/13 400/8 kind [15] 225/3 225/5 232/10 234/17 247/6 252/14 252/17 260/9 285/24 287/11 396/15 396/15 402/1 418/21 420/1 kinds [11] 225/24 232/9 285/25 310/11 348/25 351/9 384/22 390/4 391/5 408/16 415/20 knew [5] 284/18 295/8 385/11 411/20 411/23 knock [7] 250/7 250/7 252/14 252/14 252/15 252/15 252/16 knock-knock [3] 250/7 252/14 252/15 knock-knocks [1] 252/16 knocks [1] 252/16 know [116] 225/4 225/5 225/9 227/9 228/14 231/21 233/9 235/11 235/12 236/3 238/2 242/22 245/7 246/24 246/24 247/1 252/20 252/22 252/24 253/25 263/10 263/14 263/17 264/19 264/20 270/9 271/17 271/23 272/3 274/4 277/4 278/2 279/13 283/18 284/20 284/25 289/13 290/20 292/3 292/17 293/12 293/13 294/18 294/22 295/10 295/19 298/17 298/19 299/9 302/5 302/20 303/6 303/16 304/11 304/11 304/25 306/21 307/18 308/8 309/1 311/18 311/22 316/9 316/16 316/19 318/6 318/8 318/25 319/3 319/4 320/23 321/23 324/24 329/7 331/19 331/23 334/7 345/8 346/9 348/6 348/8 372/24 375/25 378/14 378/14 378/19 380/13 381/9 381/11 381/17 384/3 384/24 385/10 386/9 388/9 388/10 388/17 393/23 393/25 394/5 394/11 400/18 402/17 402/20 403/18 404/5 404/20 404/21 405/6 410/20 412/13 412/15 412/25 413/3 413/21 416/4 knowing [2] 270/5 392/12 knowledge [7] 304/24 316/20 339/6 378/15 397/3 397/11 399/22 known [2] 293/22 355/17 knows [4] 271/18 274/5 284/21 293/17
L				
				lack [11] 227/5 299/3 320/20 323/15 324/24 348/22 360/7 380/25 383/16 387/22 388/3 lacked [4] 323/16 325/1 325/3 402/20 lacking [1] 402/18 Lafayette [1] 218/21 lag [1] 358/1 language [23] 230/23 339/18

<p>language... [21] 344/16 344/16 358/19 360/15 361/3 362/8 368/19 368/19 369/1 387/21 387/25 388/22 389/3 389/5 391/2 393/25 394/2 396/3 396/16 397/7 399/13 large [2] 279/13 396/10 last [20] 221/19 223/5 223/12 223/13 233/5 244/9 260/2 268/5 290/25 306/20 327/12 331/21 332/2 351/25 352/14 353/3 356/12 359/24 361/10 420/16 later [16] 230/10 256/5 261/25 269/9 284/13 289/2 297/17 298/18 321/12 321/20 345/21 346/2 356/6 367/3 377/15 401/22 latitude [1] 386/13 LAW [3] 219/1 219/6 353/14 lay [3] 278/18 423/24 426/6 laying [1] 347/15 layman's [1] 227/2 lead [2] 347/17 414/16 leads [1] 361/7 learn [4] 255/17 392/4 392/7 392/10 learned [4] 321/11 363/3 392/9 392/12 learning [34] 226/16 226/20 226/22 324/2 337/22 337/22 341/16 342/1 342/3 343/2 343/3 343/3 343/5 343/11 343/16 344/23 345/5 345/17 346/9 346/15 346/21 346/24 347/7 347/12 347/16 347/22 348/2 350/1 350/7 351/1 351/8 351/11 364/6 392/11 lease [1] 328/15 least [8] 273/15 282/1 292/4 321/8 341/9 409/8 410/16 410/20 leave [1] 324/21 leaving [1] 420/9 left [2] 223/13 418/18 legal [2] 329/7 329/14 leisure [2] 309/4 309/5 leitmotif [1] 389/6 length [1] 346/5 lengthy [1] 333/2 less [5] 272/24 339/18 397/17 397/18 426/9 let [32] 236/6 244/17 245/11 249/25 261/19 265/10 266/5 267/9 271/7 274/15 274/15 284/6 285/5 289/15 289/20 290/19 299/25 301/6 307/17 310/4 313/6 329/8 331/11 333/15 341/20 344/1 349/5 386/10 388/7 401/16 414/15 414/17 let's [76] 222/24 222/25 225/9 227/20 227/22 228/21 232/12 236/16 237/6 238/6 240/8 243/19 245/22 245/22 247/20 248/5 248/6 250/21 252/1 253/13 256/13 258/2 263/2 264/7 267/14 267/24 268/5 270/14 276/1 276/7 276/12 276/22 276/24 277/2 277/24 281/16 282/10 283/19 284/9 288/25 289/20 290/12 294/7 294/25 298/8 300/22 300/23 302/6 304/10 305/16 307/19 309/1 309/2 309/4 311/17 316/23 317/9 320/17 320/17</p>	<p>322/8 322/18 325/16 329/2 334/9 336/4 359/11 359/21 360/8 383/22 383/23 384/1 384/6 384/7 384/11 414/21 416/23 letter [4] 248/25 404/11 404/17 420/4 letters [3] 226/23 227/3 227/4 level [30] 224/3 226/5 227/12 227/14 230/23 248/25 249/23 249/23 249/24 250/11 252/17 266/17 269/2 286/3 287/12 290/10 290/11 292/3 309/21 310/9 310/11 310/13 343/20 343/23 344/6 360/4 363/18 398/4 398/22 422/16 levels [2] 223/21 288/18 libraries [1] 312/4 license [1] 408/16 life [14] 233/11 271/5 275/10 291/23 293/8 293/18 298/22 299/14 313/23 314/11 318/10 321/20 322/5 363/3 life's [1] 355/21 lifted [2] 239/24 240/5 light [3] 304/7 306/2 417/13 like [77] 222/12 222/19 224/14 224/24 226/9 229/11 230/16 233/10 233/15 234/14 234/14 235/6 235/13 237/10 237/14 237/23 238/1 238/2 238/3 239/20 240/11 241/23 241/24 243/3 243/3 246/14 261/22 261/22 261/23 263/25 265/5 265/25 268/7 271/14 271/21 272/4 277/1 277/3 277/6 277/8 277/21 278/18 282/25 284/15 284/19 284/19 285/18 286/23 289/25 292/1 306/17 307/1 307/3 311/25 312/3 312/4 315/2 325/25 328/15 329/5 332/2 332/14 334/13 376/6 378/19 382/19 385/24 388/9 396/14 396/14 396/16 396/16 411/14 411/15 414/2 422/22 424/15 liked [3] 224/23 225/1 318/1 likely [8] 337/4 337/15 363/12 377/3 382/16 385/22 386/22 402/17 likes [6] 230/19 237/20 239/3 242/5 262/8 262/9 liking [2] 263/25 264/1 lily [1] 383/23 limit [3] 417/23 417/24 418/6 limitation [3] 259/5 298/5 338/11 limitations [1] 398/21 limited [21] 258/25 286/19 286/20 314/10 315/25 318/10 320/2 368/18 369/13 390/8 395/20 396/7 396/18 398/15 398/20 399/6 399/8 399/12 399/12 399/14 405/20 line [9] 244/10 283/17 286/15 297/15 313/23 368/5 375/12 384/20 417/15 lined [2] 257/23 426/5 lines [1] 289/21 linkage [1] 382/21 linked [1] 226/13 Linley [2] 323/25 324/14 list [4] 242/9 285/24 401/18 408/10 listed [1] 395/1</p>	<p>listen [6] 263/2 265/1 332/14 338/19 339/14 339/22 listened [2] 275/4 384/1 listening [4] 361/10 361/14 390/21 391/22 litany [1] 381/18 literacy [8] 225/22 226/2 226/7 328/3 328/12 328/13 328/14 400/24 literally [1] 324/25 literate [1] 225/24 literature [8] 357/18 360/19 372/1 372/7 377/2 377/10 407/5 414/13 little [32] 227/12 227/16 228/10 230/9 234/3 249/4 253/14 259/15 261/25 264/20 267/25 270/14 278/5 278/16 280/1 280/13 280/14 281/18 284/7 285/10 290/19 297/16 308/14 315/1 320/25 324/8 325/20 331/22 362/19 388/8 401/4 416/8 live [4] 299/19 402/5 402/21 420/10 lived [1] 301/19 lives [1] 224/5 living [14] 268/10 268/13 299/20 302/1 314/16 320/18 320/19 320/20 320/25 321/17 402/5 402/10 402/13 420/7 lobe [1] 382/15 local [2] 301/16 305/10 lockdown [2] 400/6 400/16 logistics [2] 329/11 330/4 LOL [1] 254/6 long [12] 221/23 234/12 248/24 281/25 285/11 296/19 309/3 383/24 405/23 425/18 425/21 426/8 longer [7] 273/18 273/24 297/20 325/17 325/20 355/11 416/12 longest [2] 322/10 323/7 longstanding [1] 371/7 longterm [3] 377/12 377/18 379/5 look [62] 226/10 228/22 232/14 235/12 235/23 238/6 240/8 241/11 243/19 244/17 245/11 245/20 245/22 250/21 268/9 270/14 271/3 273/9 273/12 274/16 276/22 276/24 277/24 281/5 282/10 285/18 287/7 300/19 300/22 304/10 305/16 306/2 312/17 313/2 314/8 316/1 316/23 317/9 318/10 320/3 320/7 320/19 322/4 336/2 367/10 367/14 369/22 370/10 370/10 370/14 370/20 379/20 383/22 400/21 407/17 408/5 409/9 409/23 410/5 413/15 416/5 423/11 looked [9] 235/22 301/25 352/1 367/13 376/10 409/7 420/18 422/3 422/18 looking [20] 230/15 235/10 268/17 271/15 271/16 274/3 280/25 281/1 281/8 307/25 327/11 343/13 343/14 349/24 366/2 368/24 389/1 405/7 415/10 415/11 looks [10] 226/9 239/6 305/8 305/13 305/14 306/21 307/1 307/3 411/14 411/15</p>	<p>loop [1] 337/8 FORGET [1] 218/4 losing [1] 274/12 loss [1] 271/18 lost [1] 274/17 lot [33] 233/11 234/17 236/22 250/11 262/14 275/2 278/13 281/4 288/4 294/23 329/4 330/17 331/3 333/3 333/14 333/21 351/13 358/14 375/24 381/5 381/11 381/11 381/14 381/19 385/8 389/5 391/22 392/7 400/17 424/3 424/3 424/6 426/20 lots [4] 275/3 287/20 371/11 392/4 Lou [1] 318/24 loud [2] 260/20 260/22 louder [1] 290/25 love [3] 233/14 236/23 244/11 low [1] 418/3 lower [12] 226/5 230/25 307/18 344/17 344/18 351/2 351/2 367/7 367/7 367/8 367/12 411/1 loyalness [1] 238/4 loyalty [2] 241/25 242/16 luckily [1] 408/1 lunch [3] 326/4 326/5 326/10 LYNCH [1] 218/14 lyrics [9] 235/22 235/23 235/23 236/1 236/3 236/8 236/10 236/15 236/18</p> <p>M</p> <p>ma'am [2] 235/19 235/21 made [35] 234/18 246/17 247/8 253/10 259/5 266/22 295/8 296/2 319/5 321/18 323/6 342/11 345/4 347/6 349/4 350/15 351/21 355/20 362/1 362/3 364/4 364/20 373/17 380/13 385/17 386/24 391/24 401/21 401/22 402/11 402/17 406/10 413/9 415/1 415/1 mail [20] 219/20 225/20 230/7 230/18 232/4 235/14 238/6 239/2 242/4 244/5 244/9 252/10 327/12 329/2 329/2 329/10 330/12 356/14 356/19 358/8 mailed [1] 254/5 mailer [1] 225/10 mailing [1] 244/12 mails [10] 225/13 225/21 228/22 230/6 241/22 244/8 254/6 254/15 255/23 327/12 main [1] 387/2 Mainstreaming [2] 416/16 416/17 maintain [1] 322/1 major [3] 282/5 292/6 342/5 make [42] 222/7 232/19 233/13 238/25 239/22 241/25 242/2 242/12 242/18 246/15 247/12 250/16 251/20 258/17 268/5 280/18 292/20 306/25 317/16 320/5 321/9 321/12 322/5 325/11 325/14 328/3 329/8 341/11 346/21 347/1 350/13 350/19 363/8 375/5 390/17 401/7 402/1 405/18 407/9 410/1 416/11 423/25 makes [7] 238/24 239/6 239/22 283/5 336/7 347/25 371/14 making [16] 234/2 246/18 247/16 252/4 254/13 262/5</p>
---	---	---	---

<p>M making... [10] 301/24 302/2 320/24 321/15 345/20 362/7 378/18 401/6 412/16 420/5 male [1] 395/16 man [2] 301/9 307/12 manages [1] 311/4 manifestations [1] 287/2 manner [3] 292/15 301/15 305/10 manual [9] 352/1 357/12 357/14 357/15 358/3 394/8 408/11 410/5 411/23 manuscript [1] 329/25 manuscripts [1] 329/21 many [14] 234/21 285/18 299/20 300/5 300/6 310/20 311/2 327/12 329/21 329/22 366/25 367/17 367/17 405/19 March [4] 260/2 260/12 290/13 314/6 March 2001 [1] 314/6 mark [13] 229/1 229/2 232/15 240/16 240/22 251/20 254/18 258/19 258/24 276/13 303/19 313/6 313/8 marked [28] 221/1 221/2 228/25 229/3 237/4 238/7 240/14 243/20 245/23 250/21 250/22 253/15 253/17 258/16 258/18 259/4 270/16 283/22 302/6 302/7 303/19 304/5 316/25 327/14 352/21 356/14 428/8 428/14 marked-up [1] 258/16 markets [1] 312/1 marking [5] 237/4 258/16 258/20 260/9 267/16 markings [2] 258/21 259/5 marks [1] 244/9 marshals [6] 222/4 222/6 222/12 222/14 222/15 222/16 match [1] 351/23 material [2] 362/3 426/20 materials [3] 251/24 252/2 425/1 matter [7] 220/24 255/17 269/7 269/8 284/11 427/6 427/11 Maury [1] 334/3 maximum [3] 257/21 371/21 425/22 may [78] 220/23 225/24 225/24 226/1 226/8 227/6 228/10 228/15 228/15 228/19 232/10 234/22 238/4 239/16 239/19 242/2 242/18 245/7 245/11 253/9 256/3 257/2 257/14 259/19 264/24 268/6 277/7 280/1 287/14 287/15 287/15 287/17 287/18 288/23 289/22 290/14 290/16 290/16 292/17 293/12 297/17 302/4 320/7 322/25 327/8 332/9 335/10 339/9 339/17 340/25 342/25 343/21 345/10 352/23 352/25 356/16 363/8 363/8 363/10 364/2 364/6 364/7 371/24 372/13 372/15 372/18 386/11 390/7 390/12 392/7 392/10 393/10 393/12 393/19 404/11 415/6 416/21 424/22 May 7th [1] 332/9 maybe [5] 250/15 316/16 339/20 387/16 387/16 MAYERLIN [2] 219/14 220/18</p>	<p>MCGOVERN [2] 218/16 220/14 MD's [2] 235/11 235/18 MDC [5] 230/7 311/10 316/15 388/2 388/21 me [88] 228/2 233/17 233/22 235/7 235/10 236/6 237/18 238/23 238/24 239/22 241/25 244/17 245/11 247/2 248/18 249/25 251/19 252/10 257/15 259/14 261/3 261/8 261/19 266/3 266/5 267/9 268/14 268/16 271/7 271/16 271/20 271/21 271/23 272/4 273/16 273/24 274/15 274/15 274/19 274/19 275/3 277/3 281/18 284/6 284/19 286/15 287/4 288/12 289/20 290/19 296/3 299/25 301/6 307/14 307/17 310/4 312/21 313/6 317/17 327/13 327/24 329/7 329/8 331/11 333/15 335/5 335/7 341/20 343/22 351/22 351/23 352/14 353/7 355/23 358/23 361/14 373/10 381/25 383/22 388/7 401/16 413/1 416/5 416/19 420/24 422/7 423/8 423/11 mean [47] 221/21 227/5 242/10 242/22 247/23 260/3 262/14 265/8 266/5 266/19 269/25 292/23 293/2 298/4 299/24 301/23 314/1 314/1 314/17 316/3 318/3 320/2 320/11 320/22 320/22 325/8 331/14 334/9 336/15 350/15 350/17 363/20 367/9 367/23 370/11 371/1 371/22 371/24 372/1 390/1 394/6 396/7 397/7 397/17 400/16 405/22 412/8 meaning [4] 227/5 269/1 308/16 397/22 meaningful [1] 328/23 means [17] 231/11 231/15 243/13 244/19 246/21 247/4 269/24 285/22 289/13 298/6 319/1 368/23 381/19 381/20 389/9 397/15 405/12 meant [2] 262/15 319/3 measured [1] 343/16 meat [1] 408/15 mechanism [1] 287/13 medical [3] 378/20 403/14 404/2 medication [3] 222/1 385/25 387/9 medications [3] 384/25 386/25 387/1 meds [3] 385/14 386/5 387/8 meet [7] 284/19 296/15 296/20 318/5 342/10 350/21 422/16 meeting [1] 296/4 meets [2] 350/4 350/4 members [6] 330/25 331/1 331/9 340/16 340/24 340/25 memorized [1] 248/19 memory [1] 358/22 meningitis [24] 375/4 376/12 376/18 376/19 376/20 376/21 376/24 377/3 377/11 377/24 378/13 379/5 379/20 382/9 382/17 382/21 382/24 385/23 403/18 404/22 405/6 405/24 406/1 406/3 meningococcal [1] 376/19</p>	<p>mental [46] 223/15 223/19 223/19 223/19 237/8 237/8 237/13 237/22 240/10 243/2 243/6 250/18 255/17 266/15 286/9 286/23 288/22 289/22 289/23 294/18 309/13 315/6 315/7 336/8 336/11 337/20 341/9 342/14 342/18 342/23 345/6 345/23 346/15 347/8 348/1 348/2 348/4 348/17 348/18 350/22 374/12 374/15 374/20 379/19 379/23 415/23 mentally [1] 228/7 mention [3] 298/9 321/11 345/17 mentioned [5] 242/5 278/21 295/3 331/25 368/11 messages [1] 297/23 messed [1] 380/14 met [2] 296/18 327/25 method [2] 341/6 390/4 MICHAEL [3] 219/1 219/3 220/17 microphone [3] 259/9 416/4 416/5 mid [2] 272/13 344/5 middle [4] 230/25 238/21 352/8 357/7 might [31] 224/1 224/13 225/1 226/19 226/23 227/12 237/13 237/25 238/1 240/11 243/2 262/11 273/21 285/10 287/25 287/25 288/1 294/11 296/12 299/23 308/17 309/12 315/4 321/15 329/13 331/25 337/4 388/25 396/13 399/23 418/1 mild [18] 237/8 237/22 240/10 243/1 243/6 250/18 255/16 266/15 288/22 294/18 298/5 309/13 315/5 315/7 361/4 399/2 401/3 416/13 mildly [5] 228/7 397/5 397/8 397/14 397/19 mind [2] 335/20 405/17 minor [1] 417/21 minority [1] 377/14 minute [7] 240/9 256/13 274/16 288/25 306/22 393/3 393/22 minutes [2] 257/18 326/3 misconception [1] 226/25 misdiagnosis [1] 405/25 misinterpreted [1] 277/13 mislead [1] 378/11 misleading [2] 234/3 363/16 mismarked [1] 276/11 misread [1] 362/11 miss [1] 252/10 missed [5] 232/18 376/5 378/4 378/8 380/15 misses [1] 286/17 missing [4] 268/4 374/4 375/24 409/5 missive [1] 235/12 mistake [1] 371/14 Mister [2] 261/8 293/24 Mitchell [3] 383/10 386/8 394/19 MJ [1] 271/21 mo [4] 268/10 268/11 268/12 268/13 modify [1] 308/19 moment [9] 232/13 241/21 246/10 251/19 252/5 309/4 322/8 377/25 378/10</p>	<p>mommy [1] 317/11 money [27] 261/23 262/7 263/15 268/9 268/9 268/15 268/16 269/11 269/15 269/18 269/22 270/1 270/4 270/9 287/15 287/22 288/1 309/18 312/24 314/17 317/14 317/25 318/15 318/16 325/11 325/14 329/17 Monica [9] 298/14 298/15 301/19 316/11 318/21 323/3 331/3 331/5 331/11 Monopoly [2] 309/9 309/15 Montell [1] 334/4 month [2] 395/16 396/11 month-year-old [1] 395/16 months [2] 368/7 377/8 morals [1] 268/14 more [44] 221/2 224/3 227/16 234/14 238/4 243/12 257/15 273/7 273/8 274/21 277/15 277/24 279/13 280/3 298/6 308/14 309/12 315/1 315/11 317/14 318/2 324/8 337/4 337/14 344/14 346/7 350/11 350/13 361/5 365/19 368/5 377/3 386/22 390/25 391/6 392/10 392/16 396/14 396/15 397/16 398/21 413/1 416/8 418/2 mores [1] 280/6 morning [11] 220/16 220/19 221/18 222/13 223/3 223/4 254/7 258/7 258/15 425/14 427/4 most [17] 224/4 224/4 299/1 331/11 341/11 343/12 343/13 344/2 348/19 361/12 365/20 382/16 385/22 388/12 391/3 407/8 417/17 mother [7] 268/17 272/2 272/2 273/11 273/13 299/12 299/16 mother's [1] 273/18 motion [2] 346/23 346/25 motivations [1] 391/5 mouth [2] 238/23 277/8 move [25] 221/3 232/13 237/7 245/25 248/5 253/17 254/21 258/2 276/7 277/24 283/19 289/20 297/14 298/8 309/2 320/17 336/16 353/25 356/23 364/18 384/9 405/22 414/21 425/6 425/8 moved [1] 251/17 moves [4] 240/23 250/23 335/11 381/15 movies [2] 391/14 391/16 moving [4] 229/20 232/21 251/17 278/1 Mr [38] 221/14 225/9 225/16 225/18 230/6 230/18 235/14 235/25 236/18 236/24 239/2 239/25 241/24 242/4 244/5 244/15 244/19 246/13 246/20 246/22 249/6 252/4 253/7 254/3 254/9 254/19 255/21 257/20 260/1 318/8 327/22 350/1 360/14 361/2 361/4 362/2 362/8 363/9 Mr. [148] 221/13 223/8 241/23 252/10 257/4 261/9 262/5 263/6 265/20 266/11 267/6 267/13 268/2 269/3 269/12 269/14 271/6 271/8 272/17 272/24 273/9 274/2 277/12 278/22 279/15 280/23 281/12 284/24 285/14 289/3</p>
--	--	---	---

M	Ms. [7] 331/9 361/11 426/6	426/6	No. 3227 [1] 245/23
Mr.... [118] 290/21 291/10	426/11 426/12 426/15 426/25	426/11 426/12 426/15 426/25	No. 3280 [1] 253/16
291/25 292/8 293/14 293/25	Ms. Cohen [1] 361/11	needs [4] 262/8 290/4 302/19	No. 5856 [1] 243/20
295/4 295/25 295/25 296/5 296/6	Ms. Cook [5] 331/9 426/6	339/20	Nods [4] 314/3 314/19 314/21
296/15 297/3 297/18 297/20	426/11 426/19 426/25	negate [1] 345/12	319/2
297/23 298/12 298/15 298/22	Ms. Dr [1] 426/12	Neither [1] 235/22	nomadization [1] 424/11
299/9 300/7 301/8 304/25 304/25	much [50] 221/10 223/22 228/14	neurodevelopmental [1] 348/14	non [3] 325/5 361/2 368/19
305/5 305/8 305/18 305/19	229/17 234/23 239/17 242/2	neuropsychiatric [1] 340/7	non-language [1] 368/19
306/20 306/22 307/6 307/9	242/18 257/8 257/15 263/1	neuropsychiatrist [2] 340/6	non-MR [1] 361/2
307/21 309/5 309/24 311/4	271/21 272/20 273/7 273/8 278/3	340/11	none [4] 301/19 378/20 392/18
311/14 311/20 312/9 313/23	290/25 292/7 298/18 306/5	neuropsychological [1] 377/12	404/4
313/25 314/11 314/15 314/17	306/17 308/4 310/9 314/11	neuropsychologist [2] 340/1	nonrandomized [1] 362/12
315/15 316/1 316/16 317/10	316/13 317/12 321/20 322/5	340/10	nonspecific [1] 387/14
317/13 318/14 319/13 319/17	322/19 325/17 330/11 332/15	never [7] 271/19 274/18 293/13	nonstandardized [1] 362/11
319/24 319/24 320/1 320/19	333/18 333/21 344/17 344/18	295/8 309/5 309/8 378/3	nonverbal [2] 396/21 398/1
321/11 321/17 321/23 322/4	367/6 367/7 381/23 391/3 392/16	new [14] 218/1 218/15 218/16	norm [1] 355/9
322/9 322/17 323/10 323/12	396/14 407/9 409/14 415/21	218/21 218/21 219/7 219/7 220/4	normal [7] 223/20 360/15 361/3
324/24 328/5 329/3 329/10 330/3	416/11 418/2 425/16 426/10	225/23 292/5 328/14 345/25	361/4 362/8 398/8 415/12
330/25 331/15 331/24 332/1	427/3	349/6 349/13	normative [15] 352/2 356/3
333/16 334/12 338/8 347/9	MUI [2] 219/12 220/14	New Year's [1] 349/13	356/3 356/4 356/8 357/13 357/14
348/13 350/4 351/1 358/15	multi [1] 249/8	News [2] 225/23 328/13	360/8 422/5 422/8 422/21 422/22
361/13 363/22 364/4 366/4 367/3	multi-step [1] 249/8	newspaper [2] 226/1 226/3	423/1 423/8 424/8
368/6 372/10 374/12 375/15	multidisciplinary [2] 339/12	next [20] 246/13 256/15 257/22	normed [11] 352/4 353/18
376/12 376/16 377/7 377/19	340/10	263/3 283/3 305/9 326/11 356/14	353/20 353/21 353/22 354/23
378/1 378/11 382/10 382/14	multiple [2] 244/9 370/17	361/25 362/17 365/5 370/5	355/1 355/3 355/6 367/6 368/3
384/24 386/22 389/4 390/11	mumbled [1] 395/19	371/21 385/14 389/12 392/11	norming [2] 356/21 357/10
392/25 393/12 394/23 396/3	music [19] 224/20 225/3 228/23	396/17 413/7 413/15 421/6	norms [10] 358/3 365/17 365/23
399/11 400/10 401/11 404/21	230/14 230/15 230/19 230/19	NGG [1] 218/4	365/24 366/7 366/12 366/22
405/3 407/19 411/1 415/15 420/9	231/5 231/6 231/6 231/8 231/24	nice [3] 307/1 386/14 386/17	367/5 397/4 397/12
420/12 420/22 426/1	232/13 237/6 237/7 237/20	nicely [1] 417/21	not [306]
Mr. Burt [6] 223/8 295/25	275/10 389/5 389/9	NICHOLAS [4] 218/11 220/5	note [14] 220/10 249/12 253/24
392/25 393/12 415/15 420/22	must [5] 365/13 370/11 373/13	220/6 327/1	280/14 321/9 323/7 400/24
Mr. Burt's [1] 296/6	379/8 391/22	niece [2] 319/17 319/25	401/18 401/21 401/23 413/13
Mr. Giglio [1] 426/1	my [45] 230/13 235/10 238/23	night [10] 221/19 223/5 223/12	413/13 413/14 413/15
Mr. Gilio [2] 400/10 401/11	238/23 241/24 242/1 251/6 254/7	223/13 287/22 351/25 352/14	noted [1] 256/5
Mr. Stern [2] 221/13 257/4	254/10 255/6 258/21 261/18	353/3 356/12 420/16	notes [8] 249/5 279/20 403/10
Mr. Wilson [118] 241/23 252/10	261/22 261/23 261/23 268/14	nine [8] 251/22 251/24 338/6	403/10 404/17 410/11 410/12
261/9 262/5 263/6 265/20 266/11	268/17 271/19 274/18 282/18	338/7 338/20 358/25 383/20	411/7
267/6 267/13 269/3 269/12	283/9 293/21 293/22 293/24	384/11	nothing [8] 246/12 283/17
269/14 271/6 271/8 272/17	298/1 315/10 317/11 318/5 336/4	ninth [1] 417/22	316/10 358/4 379/11 380/3 412/7
272/24 274/2 277/12 278/22	339/3 351/8 351/23 354/13	no [127] 220/8 221/6 224/19	424/18
279/15 280/23 281/12 284/24	358/22 364/19 380/18 380/20	226/2 228/25 229/23 232/24	notice [2] 345/22 348/22
285/14 289/3 290/21 291/10	381/14 382/9 384/16 387/3	233/16 235/6 235/21 238/14	noticed [1] 344/24
291/25 292/8 293/14 295/4	400/10 405/17 419/16 420/3	239/13 241/14 242/9 243/24	novel [1] 234/15
295/25 296/5 296/15 297/3	myself [1] 233/12	245/17 246/3 250/24 251/1	November [9] 218/8 314/5 314/7
297/20 297/23 298/12 298/22	N	252/15 252/19 253/5 253/19	401/10 401/22 402/10 413/17
299/9 300/7 301/8 304/25 305/5	N.Y [1] 218/5	254/2 255/17 261/2 261/2 261/2	413/20 427/6
305/8 305/18 305/19 306/20	Nagler [4] 369/25 370/5 370/6	261/11 264/2 265/9 267/8 267/20	November 1999 [1] 314/5
306/22 307/6 307/9 307/21 309/5	407/22	268/20 268/22 270/20 270/22	November 5th [2] 413/17 413/20
309/24 311/4 311/14 311/20	name [3] 271/22 334/7 403/22	270/24 271/25 273/13 273/15	ново [1] 390/8
312/9 313/25 314/15 314/17	nature [5] 362/6 388/20 402/15	273/18 273/24 276/3 276/17	now [117] 220/4 220/5 221/2
315/15 316/1 316/16 317/10	407/4 407/12	282/11 282/13 282/14 283/9	227/9 229/9 230/3 230/13 231/17
317/13 319/13 319/17 319/24	near [1] 295/17	284/1 284/11 287/20 288/1 289/7	232/1 232/12 232/15 233/4 237/2
320/1 320/19 321/11 321/17	nearby [1] 287/16	291/16 292/22 293/5 295/6	238/7 239/25 240/5 243/1 247/21
321/23 322/4 322/9 322/17	neat [1] 301/11	296/25 297/5 297/20 303/4 304/6	247/21 248/6 248/23 249/3
323/10 323/12 328/5 329/3	neatly [1] 302/2	304/24 307/11 308/22 310/8	249/11 249/22 252/9 253/13
329/10 330/3 331/15 331/24	necessarily [9] 237/9 263/15	311/12 312/20 313/16 315/10	253/24 254/15 254/17 258/8
333/16 334/12 338/8 347/9	294/18 294/22 295/16 371/22	316/20 317/4 319/8 319/20	259/14 259/15 260/1 263/2
348/13 350/4 358/15 361/13	372/14 379/18 415/6	322/13 323/5 323/9 324/18 325/4	266/25 267/24 268/5 268/5
363/22 364/4 366/4 367/3 368/6	necessary [7] 229/22 322/24	327/17 328/18 332/21 333/25	268/15 269/19 270/14 273/9
372/10 374/12 375/15 376/12	323/15 323/16 402/5 402/9	335/1 338/2 338/9 342/20 347/1	274/2 276/1 277/24 278/20
376/16 377/7 378/11 382/14	402/12	348/19 348/22 348/24 349/23	282/10 283/19 284/6 284/16
384/24 389/4 390/11 394/23	neck [4] 305/25 306/7 306/9	350/9 350/15 350/24 351/6 354/2	284/24 290/12 294/16 295/3
396/3 399/11 404/21 405/3	306/15	355/11 356/25 359/3 370/11	296/10 297/1 297/3 297/13
407/19 411/1 420/9 420/12	need [34] 221/21 221/22 221/24	370/14 371/22 371/24 372/11	298/22 304/18 306/7 306/20
Mr. Wilson's [18] 268/2 273/9	232/3 238/22 241/6 241/21	373/13 374/22 378/11 378/15	307/4 307/5 307/6 311/17 311/24
293/25 297/18 298/15 304/25	246/17 247/10 258/9 261/3	380/16 383/23 384/25 392/12	315/15 315/21 315/25 316/25
313/23 314/11 318/14 319/24	284/16 286/11 287/7 287/10	395/2 401/4 410/3 412/20 413/6	317/21 319/17 321/23 323/12
324/24 330/25 332/1 351/1	287/11 292/4 297/13 300/20	413/14 414/5 414/9 416/12	324/7 325/5 325/16 329/2 331/9
377/19 378/1 382/10 386/22	318/5 318/5 329/5 365/21 378/21	423/23 424/20 427/1 427/2	331/21 333/6 338/20 341/13
Ms [6] 222/25 259/19 321/18	379/2 379/3 386/20 386/20 399/6	No. [4] 240/14 243/20 245/23	345/19 345/21 346/13 348/5
321/20 323/19 327/8	405/16 416/22 418/21 425/10	253/16	351/13 358/14 364/10 368/9
		No. 2736 [1] 240/14	369/16 370/10 377/6 380/2 381/9

<p>N now... [20] 381/20 383/2 383/19 384/23 386/3 387/20 394/15 395/14 399/13 402/25 405/25 406/1 406/15 407/17 409/22 410/8 413/21 420/6 425/1 425/8 nowadays [1] 233/11 Nowhere [1] 345/15 number [35] 232/17 233/25 255/1 260/3 267/14 270/15 276/8 283/22 287/10 287/15 287/15 287/16 287/18 316/24 317/22 338/20 339/24 352/6 355/19 359/15 359/18 359/20 361/21 364/1 365/12 370/12 372/11 377/15 382/20 386/2 386/20 395/3 410/14 411/20 411/25 numbered [4] 232/15 237/4 327/13 327/14 numbering [2] 251/7 252/1 numbers [11] 251/4 251/6 252/5 287/18 303/21 344/9 381/9 381/10 381/21 414/9 414/10 nurse's [1] 413/13 nursing [1] 403/10 nyed.uscourts.gov [1] 219/20</p>	<p>offering [1] 238/11 offer [1] 273/19 OFFICE [2] 219/1 219/6 Official [2] 219/18 427/14 often [5] 250/18 266/19 269/11 363/4 411/6 oh [18] 241/20 265/12 271/6 274/11 276/11 277/2 285/11 291/4 301/8 304/14 306/22 319/23 325/19 332/21 348/6 354/14 392/22 416/22 okay [182] 222/24 226/4 226/15 227/8 228/21 231/1 231/7 232/12 235/2 238/6 242/11 242/24 245/22 247/20 248/23 249/13 253/3 257/22 258/13 259/10 259/19 261/8 261/21 262/11 264/7 264/25 266/11 266/23 267/24 268/1 268/24 269/3 270/2 270/23 271/3 271/13 272/3 273/23 274/25 275/16 276/4 276/6 276/14 276/15 276/22 277/3 278/18 280/4 280/8 280/25 281/16 282/3 283/7 283/13 284/9 285/13 285/14 286/5 286/22 287/25 288/7 289/8 289/12 290/8 290/12 290/12 291/2 292/8 293/13 294/25 295/14 295/19 296/6 296/20 297/10 297/13 297/14 300/6 300/22 301/18 302/1 302/6 303/16 303/23 303/25 304/10 304/19 305/2 305/24 305/25 306/2 306/6 306/10 307/4 309/1 309/8 310/4 310/19 313/25 315/15 317/9 317/18 317/21 319/6 320/9 320/17 320/18 321/11 321/20 323/9 324/16 324/20 325/16 325/16 326/6 331/8 331/20 334/8 335/9 335/14 337/13 343/2 344/4 344/20 350/6 351/12 351/19 352/10 352/20 353/5 353/23 354/18 355/12 358/7 358/13 360/2 360/13 360/21 361/24 362/13 362/16 364/9 364/19 365/4 366/1 368/8 369/2 373/5 373/16 374/9 376/14 376/21 377/9 377/16 382/23 383/23 384/4 387/6 387/19 388/1 388/13 391/16 391/18 393/10 395/5 395/14 396/17 397/18 398/1 398/13 400/19 401/9 401/16 402/4 403/7 408/1 408/19 409/8 416/6 418/4 418/9 423/4 old [23] 230/16 231/13 262/7 268/4 272/10 272/12 273/21 298/1 300/14 305/17 313/24 333/25 335/4 366/9 366/25 374/13 377/8 395/16 396/11 403/1 404/18 405/7 420/12 older [12] 230/13 261/15 263/25 272/11 316/13 320/25 365/15 365/16 365/17 365/19 368/3 388/14 Olley [13] 340/3 425/15 425/18 425/23 426/11 426/12 426/12 426/13 426/14 426/16 426/16 426/22 426/24 Olley's [3] 249/12 249/13 249/19 Ollie [1] 293/24 one [133] 220/24 225/15 226/2 226/22 228/18 231/17 231/18 233/18 236/24 244/6 244/25</p>	<p>244/25 245/1 245/2 251/19 250/23 250/12 258/8 258/12 259/11 259/12 259/16 263/2 263/3 264/7 265/5 265/25 267/1 267/10 271/25 272/10 273/5 273/5 273/13 275/24 277/3 277/24 278/14 279/20 281/17 281/20 282/5 287/15 287/24 288/7 289/1 291/16 294/16 297/15 298/2 304/11 306/22 307/12 309/7 310/13 311/12 311/18 318/1 322/14 322/21 322/21 322/22 323/9 323/18 323/19 325/20 325/22 327/12 331/21 332/2 332/12 334/4 341/20 345/23 346/7 350/11 350/13 352/3 354/8 355/13 355/16 359/10 359/11 359/24 359/24 360/10 362/18 362/24 363/3 363/8 364/1 364/3 365/19 368/11 368/14 370/2 370/13 370/21 370/24 371/21 381/25 382/21 382/21 387/15 388/25 394/18 395/14 396/21 398/6 399/20 400/13 401/15 406/25 407/3 407/8 407/25 408/12 408/21 408/21 408/21 411/18 412/9 413/2 415/7 416/7 416/21 417/18 418/20 420/25 423/5 424/10 424/16 425/23 one's [2] 244/6 363/13 one-to-one [1] 382/21 ones [5] 229/4 273/5 364/8 410/22 410/25 only [25] 222/2 228/6 232/17 265/16 269/14 271/17 274/4 276/23 277/11 315/25 323/14 325/19 341/7 344/5 347/7 357/25 358/5 358/24 367/5 370/21 382/9 382/21 407/17 409/16 418/19 onset [1] 379/23 open [13] 220/1 220/2 260/16 261/4 261/6 262/1 264/18 265/6 290/23 291/1 327/4 349/2 381/4 opened [1] 386/12 opening [2] 345/25 349/6 operate [1] 339/12 operates [1] 370/22 operating [5] 230/8 295/4 295/8 295/10 297/22 operational [1] 371/25 opine [1] 426/22 opinion [24] 239/17 249/14 249/16 255/9 292/9 296/16 309/23 338/7 339/16 339/24 345/11 345/21 356/19 364/14 372/9 379/6 379/6 398/24 419/14 419/22 419/23 419/25 420/3 423/19 opinions [4] 338/25 376/3 378/6 379/9 opportunity [2] 301/20 426/23 opposed [4] 225/4 362/11 390/24 417/23 Oppositional [4] 404/25 405/12 405/18 405/20 Optical.com [1] 317/12 order [10] 232/17 253/15 280/2 293/18 333/24 342/6 349/15 356/14 365/16 380/24 orders [1] 333/18 organized [1] 273/7 origin [1] 253/5</p>	<p>original [3] 337/19 352/5 355/9 originally [4] 257/3 352/11 358/10 422/5 originated [1] 338/18 other [85] 225/6 233/10 236/20 244/7 245/1 258/14 259/11 259/12 265/16 267/1 269/10 274/1 274/7 279/3 280/22 280/22 281/14 287/3 289/1 289/6 290/5 292/12 293/17 297/10 298/25 299/2 305/9 306/17 307/9 310/9 312/2 312/6 320/13 322/22 323/5 323/13 323/19 331/9 332/13 337/9 338/25 339/4 339/5 339/8 339/9 339/20 341/4 342/13 346/6 346/18 355/14 363/6 363/11 368/10 371/24 372/15 373/7 378/18 379/8 379/15 381/5 383/7 387/10 387/10 390/9 390/13 391/25 396/13 396/24 398/1 398/11 402/25 406/17 409/16 410/8 411/2 411/4 415/7 416/22 416/22 416/25 419/25 424/1 425/16 425/17 others [5] 278/25 279/3 308/6 311/14 361/7 otherwise [1] 367/11 ought [2] 303/6 414/17 our [16] 224/4 229/6 255/19 272/2 272/2 273/11 273/13 273/25 274/21 275/24 288/9 304/16 340/13 349/15 357/7 384/23 ours [2] 273/11 273/19 out [55] 221/22 222/4 222/11 222/14 224/19 232/17 233/7 237/6 238/23 240/21 242/2 242/19 248/20 253/14 277/7 278/18 280/3 281/15 284/17 284/18 286/7 286/23 289/14 290/22 297/7 301/4 308/4 314/6 314/14 314/18 315/4 315/11 318/17 322/9 323/14 323/22 323/24 324/3 324/8 324/12 324/14 324/15 345/19 345/21 347/12 347/22 348/3 359/5 365/6 378/7 403/24 411/24 413/1 415/15 425/12 outdated [3] 366/22 366/23 366/24 outside [5] 223/20 257/24 287/19 378/2 383/19 over [15] 225/12 227/23 233/15 364/8 372/3 372/3 372/4 405/4 405/4 405/4 411/20 411/24 412/2 425/1 425/9 overall [5] 349/3 375/9 391/19 392/9 398/13 overcoat [2] 306/25 307/1 overcoat's [1] 307/1 overestimates [1] 371/15 overlap [1] 248/2 overlapping [1] 388/11 overreach [1] 293/12 overruled [1] 256/5 overshadowed [1] 348/15 overt [1] 410/3 overwhelming [1] 417/9 own [8] 232/1 236/18 251/7 354/13 354/15 390/8 390/13 402/6</p>
			<p>P P.C [1] 218/20</p>

<p>P p.m [2] 327/2 349/17 packet [1] 415/2 page [36] 230/8 241/12 248/21 249/5 256/15 295/4 295/9 295/10 297/3 297/4 297/7 326/11 340/15 346/5 348/13 352/6 352/8 359/25 360/22 362/17 373/25 376/16 389/12 396/17 401/13 401/20 402/4 404/2 408/5 409/5 409/5 409/6 412/7 413/9 421/6 428/2 page 292 [1] 360/22 page 85 [1] 340/15 page GOV 27 [1] 376/16 pages [2] 225/12 375/17 paper [4] 229/3 229/11 229/13 240/18 papers [1] 378/25 paragraph [12] 226/10 226/11 226/14 230/4 233/5 241/19 267/25 361/25 362/18 362/24 363/2 404/20 paragraphs [2] 225/21 225/21 PARALEGAL [2] 219/13 219/14 parenthesis [1] 238/22 parents [1] 339/4 parents' [1] 299/4 parks [1] 312/4 part [29] 232/4 235/18 235/25 246/13 248/7 251/14 252/5 275/23 276/22 291/19 291/19 293/6 293/9 299/1 299/14 303/1 303/2 303/13 323/13 335/6 339/15 346/13 346/14 360/11 360/18 391/12 394/24 408/6 408/6 partial [1] 396/24 participated [1] 423/5 particular [10] 230/7 247/25 254/22 336/20 347/24 364/7 371/12 376/23 388/23 416/23 particularly [5] 230/11 253/4 370/16 382/14 416/12 particulars [1] 392/1 parties [1] 391/4 party [5] 224/2 254/8 254/10 391/10 391/13 pass [2] 263/20 267/17 passed [1] 385/13 passively [1] 395/17 past [6] 233/8 233/10 268/4 360/4 374/16 417/8 paternity [1] 334/6 pathologist [1] 339/18 patience [2] 257/13 309/12 pattern [3] 398/10 401/24 406/23 pause [1] 290/24 pay [1] 317/24 PBS [1] 388/21 peacefully [1] 246/19 peer [1] 403/13 penal [1] 400/12 penalty [1] 347/18 people [57] 223/19 223/21 225/23 226/5 227/3 250/18 271/20 274/18 277/7 282/15 283/11 284/18 286/9 287/2 288/22 289/6 289/14 293/17 293/21 294/1 294/9 298/5 299/20 301/19 305/9 307/9 315/7 323/9</p>	<p>325/13 330/17 330/24 331/14 339/7 339/5 360/14 362/8 363/9 364/2 364/5 373/11 376/4 376/11 377/3 377/14 378/4 378/8 385/10 391/2 391/3 394/14 394/15 394/18 401/5 402/25 411/2 416/13 423/5 people's [2] 288/9 361/12 perceived [1] 227/6 percent [2] 329/6 417/25 percentile [1] 417/23 perfectly [1] 305/13 performance [13] 226/5 351/1 351/2 369/23 370/3 370/7 371/2 371/4 372/19 395/6 398/6 399/9 410/14 performing [2] 343/24 371/20 perhaps [2] 227/11 303/5 period [7] 314/15 320/8 358/20 391/23 394/15 400/20 402/22 permanent [1] 382/12 permission [1] 222/20 permitted [1] 416/8 persists [2] 281/10 282/1 person [59] 224/1 224/22 226/20 230/7 233/13 235/9 236/17 237/10 237/13 237/14 237/24 237/25 240/11 244/7 244/12 247/8 247/8 247/13 252/9 254/5 265/8 265/20 268/11 269/18 269/21 280/9 284/20 287/8 289/12 289/17 289/18 290/5 290/8 294/7 294/8 294/12 294/17 295/20 295/22 296/9 297/20 297/21 297/24 297/24 300/11 308/18 313/2 314/9 330/14 333/16 343/10 344/15 371/7 371/14 371/20 390/22 392/10 413/1 417/6 person's [6] 296/24 339/7 339/11 343/14 388/19 418/23 personage [1] 355/18 personal [4] 298/12 301/12 309/2 401/20 persons [1] 340/20 perspective [3] 280/8 293/11 320/6 pertinent [1] 279/5 peruses [10] 279/8 285/13 320/5 395/24 399/22 407/23 408/4 411/8 411/13 413/11 pervasive [1] 337/10 PET [19] 375/4 377/25 378/3 379/4 379/17 379/17 379/25 380/3 380/17 380/23 381/7 381/12 382/10 382/12 382/13 382/18 385/20 385/24 386/3 PET scan [2] 379/17 381/7 phenomena [1] 352/15 phone [20] 254/15 254/17 254/19 254/19 254/20 254/22 255/7 255/23 260/1 262/22 265/16 277/10 289/21 325/22 331/21 332/2 332/8 332/10 332/12 334/17 photo [2] 304/11 306/11 photos [1] 302/7 phrase [5] 266/2 266/4 266/6 266/8 285/23 phrases [2] 389/2 390/2 physical [2] 239/4 339/20 physicians [1] 340/17 pick [5] 225/22 228/19 235/2</p>	<p>235/10 319/16 pictures [1] 303/6 piece [1] 280/21 piecemeal [1] 251/18 pieces [3] 235/11 247/7 390/19 pile [1] 229/6 pill [1] 221/20 pinpoint [1] 380/23 place [9] 246/17 247/10 317/18 317/24 320/3 320/7 343/22 400/16 403/1 placed [1] 387/9 placement [1] 404/13 places [4] 312/6 313/13 317/14 321/16 Plaintiff [1] 218/3 planning [6] 330/5 330/7 330/9 330/10 330/12 337/20 plates [1] 408/16 play [31] 254/15 254/22 260/1 261/17 261/23 261/24 263/3 263/5 264/7 264/8 265/17 271/22 289/20 290/12 310/7 310/11 310/17 310/18 311/9 331/21 331/22 332/2 335/19 367/9 370/13 371/16 372/3 372/11 372/13 372/15 381/11 played [16] 260/16 261/4 261/6 262/1 264/18 265/6 275/5 290/23 291/1 309/5 309/8 309/24 310/2 332/17 332/20 335/12 players [1] 310/12 playing [3] 311/5 333/6 422/16 plays [1] 379/5 Plaza [1] 218/15 please [16] 220/10 220/19 235/3 237/18 251/19 257/2 264/24 266/16 268/5 277/3 327/3 332/16 359/16 359/19 393/7 393/11 plot [1] 334/3 pocket [1] 228/16 point [59] 221/4 231/2 234/18 252/4 266/22 283/3 285/1 286/17 294/16 316/15 334/14 335/25 337/1 345/4 345/10 345/11 347/5 347/13 349/4 364/19 364/20 365/21 365/22 367/23 371/21 371/21 372/9 373/3 373/10 373/17 374/19 379/7 380/4 381/2 381/4 381/14 382/9 384/16 384/21 387/14 390/17 396/25 402/16 405/2 409/8 412/11 412/13 412/16 416/21 417/17 417/17 418/21 423/10 423/18 423/25 424/4 424/6 424/7 426/7 pointless [1] 310/7 points [8] 367/17 367/19 367/20 372/19 372/22 373/1 375/6 416/11 Policy [1] 353/14 political [1] 374/4 poor [3] 249/7 369/5 403/12 poorly [1] 322/21 Pop [7] 301/3 301/3 301/6 301/14 305/10 410/11 410/14 population [1] 369/14 portion [1] 361/1 posed [5] 241/22 282/24 347/20 357/5 384/14</p>	<p>positing [1] 364/17 positions [1] 323/2 positive [1] 378/10 possess [1] 322/24 possesses [1] 402/5 possible [1] 343/18 possibly [3] 240/7 346/16 378/8 post [1] 255/7 potential [4] 343/14 343/15 344/7 365/22 potentially [6] 242/12 324/4 324/5 331/12 382/20 385/25 Povich [1] 334/4 power [1] 246/16 PowerPoint [2] 372/1 409/13 practical [1] 278/7 practice [22] 339/2 339/3 351/8 363/17 366/20 369/19 370/11 371/23 372/2 372/10 372/18 373/1 414/3 417/3 417/14 418/13 418/16 419/7 419/11 419/17 419/19 419/23 practices [1] 365/14 practitioners [1] 366/12 pre [2] 359/1 400/4 pre-18 [1] 359/1 pre-Brookwood [1] 400/4 precipitated [1] 281/20 precise [1] 363/18 precisely [1] 423/12 precision [1] 415/13 predict [2] 369/11 371/11 predicted [3] 343/20 344/8 368/17 predictive [2] 369/5 369/13 predictors [1] 368/20 preferred [1] 341/6 pregnant [1] 290/22 prejudice [1] 374/2 preliminary [1] 323/17 premarking [1] 232/18 preparation [1] 364/13 prepared [1] 345/22 present [10] 219/11 220/2 281/10 313/24 315/20 327/4 331/17 376/5 388/13 393/18 presentation [4] 341/10 387/24 406/20 414/24 presented [3] 301/25 358/19 389/7 Presenting [1] 403/11 presents [1] 348/13 presiding [1] 220/5 Presumably [1] 414/1 presume [1] 413/4 presumption [3] 412/23 414/12 414/25 pretty [8] 243/8 243/9 278/3 292/7 306/17 334/10 361/13 425/15 previous [5] 296/18 362/1 364/8 403/16 409/5 previously [2] 302/7 339/5 prevocational [1] 323/20 pride [1] 301/10 primarily [5] 293/23 318/23 321/1 342/25 368/18 primary [1] 340/25 principle [1] 424/12 printout [1] 240/16 prior [17] 258/10 303/22 304/12 304/22 327/11 359/2 359/2 373/7</p>
--	---	--	---

<p>P</p> <p>prior... [9] 378/11 378/17 378/20 380/25 384/18 402/2 403/14 405/23 406/8</p> <p>prison [13] 280/11 280/16 281/1 281/6 281/9 295/5 305/1 311/15 314/9 314/11 314/18 315/4 321/21</p> <p>prisoners [2] 280/22 363/4</p> <p>pristine [1] 344/2</p> <p>privy [1] 334/18</p> <p>probably [23] 222/8 227/10 230/24 247/17 257/21 278/13 289/10 310/12 310/13 318/2 329/16 329/23 341/11 344/14 382/17 385/22 386/21 386/24 393/1 397/17 398/20 426/9 426/16</p> <p>problem [12] 221/15 222/2 222/10 269/11 269/12 278/22 289/3 336/14 337/7 347/23 361/2 363/13</p> <p>problems [8] 281/3 296/20 336/11 337/21 362/2 374/5 403/11 405/8</p> <p>procedure [1] 395/18</p> <p>proceed [3] 220/23 222/24 259/19</p> <p>proceeding [4] 416/9 420/2 422/15 422/17</p> <p>proceedings [2] 219/20 427/11</p> <p>proceeds [1] 329/17</p> <p>process [7] 290/3 333/3 339/8 373/3 394/24 415/16 425/11</p> <p>processing [1] 363/14</p> <p>produce [1] 301/18</p> <p>produced [6] 219/21 240/20 251/16 254/21 355/24 400/14</p> <p>product [3] 301/22 301/23 301/23</p> <p>profession [1] 366/11</p> <p>professionals [7] 339/24 341/1 374/13 374/16 374/20 412/24 412/25</p> <p>professions [1] 340/16</p> <p>profile [1] 351/10</p> <p>profiles [1] 351/9</p> <p>prognosticating [1] 368/25</p> <p>prognosticator [1] 369/1</p> <p>program [7] 292/23 323/20 323/22 387/3 400/7 402/1 402/15</p> <p>programs [4] 377/4 400/23 400/24 401/25</p> <p>progress [13] 401/4 401/4 401/4 401/6 401/8 401/18 401/21 401/22 401/23 402/1 402/8 402/11 402/17</p> <p>progressing [1] 417/6</p> <p>prolific [1] 225/10</p> <p>prompt [1] 357/19</p> <p>prong [1] 397/24</p> <p>proof [1] 337/6</p> <p>proper [3] 292/15 361/22 407/20</p> <p>properly [3] 234/11 344/12 413/5</p> <p>properties [1] 309/16</p> <p>proposed [1] 355/10</p> <p>proposition [1] 426/17</p> <p>prorated [1] 410/14</p> <p>prosecutor [1] 351/20</p> <p>protect [3] 271/20 273/25 274/18</p>	<p>protector [2] 273/25 274/21 274/21 274/21</p> <p>protocol [10] 407/14 411/23 411/25 412/3 412/4 412/16 412/20 413/25 415/5 415/6</p> <p>proud [1] 272/6</p> <p>proverbs [2] 255/21 255/22</p> <p>provide [5] 222/5 303/8 303/20 320/14 362/7</p> <p>provided [8] 254/18 254/24 273/8 302/8 317/17 330/24 348/23 403/8</p> <p>providing [3] 289/18 303/11 425/3</p> <p>provision [2] 340/20 340/25</p> <p>psychiatric [6] 383/3 383/15 383/17 384/25 385/14 403/24</p> <p>psycholinguistics [1] 361/8</p> <p>psychological [3] 366/11 366/15 366/17</p> <p>psychologically [2] 413/16 413/20</p> <p>psychologist [5] 301/7 339/17 340/3 366/24 421/3</p> <p>psychologist's [2] 413/13 413/14</p> <p>psychologists [3] 340/17 366/19 419/20</p> <p>Psychology [1] 353/14</p> <p>psychotic [1] 387/12</p> <p>public [3] 311/20 312/4 353/14</p> <p>publication [2] 358/4 368/14</p> <p>published [8] 329/11 329/13 330/14 352/4 353/14 354/24 356/6 358/1</p> <p>publisher [3] 327/24 329/7 329/14</p> <p>publishing [3] 327/23 329/4 329/19</p> <p>pull [6] 240/21 244/15 244/24 248/20 286/7 390/3</p> <p>pulled [2] 389/9 390/13</p> <p>pulling [3] 244/7 245/1 245/2</p> <p>pulls [2] 389/5 390/19</p> <p>purchase [2] 309/16 358/1</p> <p>purchasing [1] 312/1</p> <p>purely [1] 362/6</p> <p>purpose [3] 258/25 303/18 347/15</p> <p>purposes [3] 303/12 357/9 394/23</p> <p>pursuits [1] 400/1</p> <p>pushing [2] 244/7 244/25</p> <p>pushup [1] 307/18</p> <p>pushups [1] 307/17</p> <p>put [25] 236/10 237/18 239/24 241/21 278/10 278/14 289/10 290/4 298/2 305/20 305/23 319/23 322/2 323/22 328/24 356/7 361/11 378/24 379/9 380/22 381/24 382/20 415/2 425/6 425/7</p> <p>puts [4] 271/17 274/4 294/23 357/23</p> <p>putting [9] 226/15 236/4 236/11 238/8 238/10 259/1 266/20 286/14 320/6</p> <p>Q</p> <p>qualitative [1] 362/6</p> <p>qualities [2] 238/3 242/5</p> <p>quality [3] 242/19 242/20 363/13</p> <p>question [75] 225/2 227/21</p>	<p>234/10 236/7 237/11 241/22 244/2 259/25 1/22 260/19 265/11 266/21 274/14 275/12 275/14 276/3 276/5 277/20 282/18 282/23 282/24 283/5 283/14 286/11 288/12 294/6 296/13 299/3 300/17 300/17 304/15 315/7 315/10 317/23 329/22 330/6 334/22 337/7 337/11 342/15 347/20 348/11 349/5 349/18 349/22 353/11 357/5 357/8 358/24 363/24 377/21 379/15 381/24 381/25 382/6 384/13 385/20 389/1 393/22 400/18 405/11 405/14 406/7 406/15 406/18 413/7 414/6 414/11 414/16 416/6 420/6 422/24 423/14 423/25 424/1</p> <p>questioning [4] 286/15 373/15 375/12 384/21</p> <p>questions [22] 296/12 332/3 338/2 351/13 358/14 364/10 364/23 369/19 373/6 373/8 374/3 391/5 394/20 395/17 395/19 396/15 407/13 408/15 408/17 419/1 419/7 420/15</p> <p>quibble [1] 263/14</p> <p>quick [4] 325/21 325/21 332/11 332/19</p> <p>quickly [3] 263/6 263/10 337/22</p> <p>QUINN [3] 219/6 219/8 220/17</p> <p>quite [9] 228/13 228/18 247/18 274/24 306/21 329/19 366/9 400/20 420/10</p> <p>quote [21] 243/3 243/4 243/5 243/8 243/13 244/13 244/20 245/15 245/22 246/9 246/10 246/21 247/4 247/5 247/15 247/17 305/9 341/1 360/3 395/15 407/8</p> <p>quoted [1] 365/2</p> <p>quotes [1] 244/6</p> <p>R</p> <p>rain [3] 284/14 285/19 285/20</p> <p>raise [2] 348/12 380/11</p> <p>raised [7] 334/22 341/15 341/25 342/13 345/13 380/8 406/15</p> <p>RAMIREZ [2] 219/13 220/15</p> <p>randomized [1] 362/6</p> <p>range [8] 282/16 397/6 397/7 397/8 397/15 397/19 398/14 415/4</p> <p>rap [3] 390/11 390/13 390/13</p> <p>rare [1] 346/17</p> <p>rate [1] 401/7</p> <p>rather [7] 226/11 272/25 294/22 318/5 361/7 363/17 396/15</p> <p>raw [5] 375/22 409/24 411/10 414/3 418/12</p> <p>reach [3] 297/7 339/24 385/5</p> <p>reached [1] 374/16</p> <p>reaches [2] 398/18 404/24</p> <p>reaching [4] 256/7 339/16 390/20 415/22</p> <p>read [17] 225/23 226/1 226/3 227/10 233/7 234/3 234/4 234/6 244/10 297/14 328/13 328/17 328/20 357/6 363/2 364/13 394/13</p> <p>reading [17] 226/7 227/11 227/14 233/19 233/23 234/1 234/9 244/18 245/11 285/3</p>	<p>319/22 328/15 344/5 344/8 344/10 345/5 357/25</p> <p>ready [3] 257/24 302/3 420/10</p> <p>real [13] 233/12 233/17 241/25 242/19 242/21 242/22 242/23 301/21 330/22 346/3 373/17 386/1 391/17</p> <p>real-time [2] 330/22 386/1</p> <p>realize [3] 239/25 262/24 317/24</p> <p>realized [2] 276/13 323/21</p> <p>really [34] 224/6 226/10 226/11 227/4 231/25 235/7 238/23 239/9 243/13 250/19 271/19 272/14 274/17 275/11 276/24 283/17 318/6 318/21 320/9 320/22 322/5 324/24 336/2 346/8 347/13 362/7 381/21 405/17 414/9 414/21 415/13 419/24 420/22 423/25</p> <p>reason [12] 238/2 240/15 255/20 283/4 309/11 311/19 333/5 333/15 344/13 346/10 394/4 405/25</p> <p>reasoning [17] 224/11 228/13 228/14 255/15 275/17 288/14 290/9 292/15 333/12 333/14 333/15 333/19 337/20 390/18 390/21 391/3 391/6</p> <p>reasons [10] 282/5 287/3 287/20 314/9 333/17 360/6 364/1 364/1 364/3 406/8</p> <p>rebut [1] 345/11</p> <p>recall [18] 223/17 224/2 240/12 259/24 267/11 300/8 300/12 300/25 301/12 341/18 342/15 358/18 358/24 373/8 394/19 403/7 419/8 420/7</p> <p>receive [3] 248/16 277/5 354/7</p> <p>received [41] 221/10 221/11 229/25 230/1 232/25 233/2 238/15 238/17 241/15 241/17 243/25 244/2 246/4 246/6 251/1 251/2 253/20 253/22 255/3 259/4 259/8 267/21 270/24 271/1 276/19 276/20 284/2 284/4 313/18 313/19 317/5 317/7 319/9 319/11 327/18 327/20 354/5 354/11 354/18 357/1 357/3</p> <p>recess [2] 326/10 393/5</p> <p>recognition [2] 365/14 398/2</p> <p>recognize [3] 245/16 279/9 365/21</p> <p>recognized [3] 355/21 379/15 399/8</p> <p>recognizing [2] 293/8 317/13</p> <p>recollection [5] 351/24 380/16 380/18 380/20 422/23</p> <p>recommendation [1] 417/3</p> <p>record [41] 220/11 221/17 233/23 234/9 234/18 234/20 236/5 236/10 236/11 238/8 238/10 251/3 251/14 251/20 252/5 257/4 258/4 258/6 258/17 258/18 258/24 259/1 280/15 283/16 301/7 303/1 303/13 354/12 359/16 359/18 375/19 375/22 378/24 379/25 380/21 381/5 381/20 383/10 401/17 416/3 427/11</p> <p>recorded [4] 219/20 330/21 359/2 408/18</p> <p>recording [6] 264/13 332/17 332/20 332/23 335/11 335/12</p> <p>records [44] 249/20 280/10</p>
--	--	---	--

R records... [42] 281/12 293/25 295/15 296/13 296/18 300/6 309/10 310/1 310/3 311/2 311/23 330/21 331/5 339/4 345/15 374/10 375/13 375/15 375/16 375/18 375/20 375/23 375/24 376/10 376/15 376/16 378/16 378/18 378/19 383/2 383/9 385/9 395/8 400/13 400/17 400/19 400/25 401/17 403/18 405/3 416/1 422/1 recreational [1] 312/5 RECROSS [1] 419/4 RECROSS-EXAMINATION [1] 419/4 red [3] 305/20 305/22 305/23 redirect [10] 338/3 338/4 347/4 380/2 386/11 392/19 392/21 392/23 393/4 428/3 Redirect/Burt [1] 428/3 reduces [1] 372/15 refer [3] 241/6 354/22 412/13 reference [3] 234/2 341/24 359/22 references [3] 258/11 353/18 353/19 referred [2] 258/5 377/4 referring [10] 251/4 251/5 271/6 316/3 354/21 394/6 401/11 401/12 402/19 412/7 refers [2] 281/2 412/14 reflect [4] 233/24 273/17 371/6 371/8 reflected [3] 234/22 365/11 372/13 reflects [1] 308/24 reflux [1] 221/18 refresh [2] 358/22 422/23 regarded [1] 423/15 regarding [2] 338/8 339/11 regularly [2] 307/7 311/10 rejection [1] 248/17 relate [3] 249/1 278/24 358/20 related [1] 388/11 relates [1] 247/14 relating [2] 247/7 341/9 relation [1] 341/15 relationship [5] 233/16 235/6 263/24 294/19 388/23 relationships [2] 294/17 298/7 relative [3] 338/16 350/20 388/14 relatively [2] 361/4 363/6 release [1] 402/11 released [1] 401/10 relevancy [1] 255/12 relevant [11] 255/12 255/14 256/3 256/4 354/23 359/5 363/24 380/5 381/7 406/7 426/21 reliability [1] 381/24 reliable [8] 381/23 382/1 382/1 406/17 406/17 409/11 414/7 417/17 relied [5] 220/25 378/18 422/1 423/21 425/5 rely [6] 355/23 356/19 394/4 415/21 419/19 423/20 relying [7] 318/21 341/3 345/15 346/13 369/10 381/9 381/10 remain [1] 368/19 remark [1] 303/17	R remember [8] 301/16 316/7 321/12 349/22 351/1 359/4 401/15 403/3 remind [1] 220/21 reminded [2] 257/11 327/6 remotely [1] 230/8 removed [1] 255/8 render [3] 419/14 419/22 419/25 rendition [1] 234/5 repair [3] 307/2 307/3 312/3 repeat [9] 232/10 237/11 249/25 263/22 274/14 292/20 294/6 377/21 422/24 repeated [2] 369/4 405/3 repeating [3] 231/23 252/25 292/17 repertoire [1] 363/9 rephrase [1] 312/21 replace [3] 272/3 273/11 273/13 replay [1] 335/7 reply [1] 357/19 replying [2] 395/17 395/18 report [37] 248/20 248/21 249/4 249/6 249/12 249/13 249/19 267/1 293/21 293/22 293/24 321/13 328/5 344/24 345/1 345/2 345/3 345/10 345/16 345/21 346/13 347/25 348/12 348/23 349/3 350/25 358/11 373/7 376/22 377/2 395/8 395/14 406/2 409/22 422/18 422/20 422/22 reported [6] 279/17 279/20 295/12 383/9 404/9 424/14 Reporter [4] 219/18 219/18 427/9 427/14 reports [8] 298/14 298/25 309/7 323/18 330/20 348/9 380/22 380/23 repped [1] 230/13 representation [1] 303/20 representative [1] 295/17 represents [1] 334/23 reputation [1] 418/23 request [1] 248/16 requesting [1] 404/12 require [7] 250/11 290/11 309/12 309/21 320/24 348/18 365/14 required [1] 311/22 requires [6] 266/17 310/9 330/11 330/14 365/20 416/23 requiring [1] 346/1 research [2] 361/3 423/10 resident [3] 300/11 403/22 404/9 resolve [5] 280/11 280/23 281/13 281/25 290/7 resolved [1] 257/6 resource [1] 245/12 resources [6] 311/17 311/20 311/24 312/18 315/2 318/18 respect [4] 241/25 278/8 279/15 362/3 respond [4] 276/2 347/18 380/12 385/15 responded [3] 272/5 357/20 395/16 respondent [3] 396/18 396/19 398/15 respondent's [1] 397/2 responding [7] 263/9 263/10 274/20 279/5 333/9 387/11 387/15 responds [2] 244/15 252/11	S response [18] 261/22 267/8 278/12 293/7 296/25 300/11 310/8 312/20 319/20 345/19 345/23 346/21 383/16 384/25 409/14 413/6 414/5 418/17 responses [3] 407/10 408/11 408/18 responsible [2] 300/19 301/24 responsive [3] 345/4 347/14 379/7 rest [4] 246/18 247/13 252/2 271/9 restate [2] 266/5 299/25 restated [1] 334/18 result [7] 300/4 346/1 346/25 355/14 355/24 363/7 399/10 resulted [1] 296/4 results [1] 418/19 resume [1] 220/20 resumed [1] 332/23 resumes [1] 393/9 retake [3] 257/2 265/10 393/6 retakes [3] 257/3 265/14 291/5 retardation [36] 223/15 223/19 224/14 231/19 232/8 237/9 237/13 237/22 240/10 243/2 243/6 250/19 255/17 266/15 286/10 286/23 288/22 289/22 289/23 294/18 309/13 315/6 315/8 345/6 345/24 346/15 347/8 348/1 348/2 348/5 348/17 348/18 350/23 379/19 379/23 415/23 retarded [1] 228/8 retract [1] 331/12 retrieve [1] 408/3 reverse [1] 227/3 review [10] 256/6 293/24 295/15 358/8 358/9 383/2 395/12 403/18 408/24 410/5 reviewed [6] 249/20 349/24 374/10 376/15 395/9 409/19 reviewing [6] 296/13 296/17 330/21 355/15 396/2 424/9 reviews [1] 234/20 revolves [1] 389/8 rich [2] 252/11 252/22 right [416] Rikers [1] 314/5 rise [2] 220/3 254/5 risk [2] 376/24 382/25 Ritalin [1] 387/11 road [3] 406/4 406/6 417/1 rock [3] 224/15 224/17 231/23 Rockaway [1] 301/5 role [1] 339/8 RONELL [2] 218/6 220/9 room [1] 420/17 Roosevelt [3] 246/10 246/12 246/20 ROTHMAN [1] 218/20 rough [2] 230/23 329/8 roughly [1] 226/6 routine [3] 308/7 308/8 308/11 routines [2] 307/21 308/13 row [1] 363/4 RPR [2] 219/18 427/14 rule [4] 228/15 228/17 347/12 347/22 ruled [2] 364/16 364/17 rules [2] 228/16 236/12 run [2] 281/14 415/4 running [1] 348/25 runs [1] 334/5	S sad [1] 271/8 safety [2] 320/18 320/18 said [77] 223/23 224/13 225/19 230/17 237/17 239/9 244/17 247/11 260/12 261/14 261/22 262/14 262/15 263/23 266/14 268/22 269/23 270/11 272/6 274/2 274/20 275/1 275/5 280/12 280/13 282/11 284/16 285/20 287/6 287/24 296/23 297/21 301/3 301/9 301/14 302/4 307/13 307/14 309/4 309/5 311/18 315/23 316/7 318/24 321/12 322/2 328/5 329/8 330/4 334/11 335/1 336/6 336/15 348/4 349/15 350/25 351/4 355/23 358/15 361/19 370/12 370/23 371/10 382/24 384/2 384/4 385/21 385/21 386/9 388/6 393/4 407/20 415/19 417/14 420/2 420/3 420/20 same [49] 230/14 231/6 237/7 237/20 237/21 241/12 242/3 255/22 264/3 268/3 272/6 273/14 273/16 273/17 273/18 274/6 274/20 274/22 274/23 275/9 278/4 278/6 282/16 285/22 289/21 289/23 292/7 300/17 301/14 303/3 303/21 307/16 311/3 334/18 342/3 342/5 342/6 342/7 342/23 361/25 367/21 370/18 371/25 390/12 396/21 402/4 422/15 422/16 425/5 sample [6] 352/3 356/3 356/3 356/5 356/8 357/23 San [1] 219/2 sandwich [1] 222/12 save [1] 270/5 saw [4] 253/7 333/14 383/2 401/9 say [63] 222/11 224/22 231/2 231/25 234/10 236/1 236/16 237/21 238/25 239/22 243/9 245/10 247/15 247/24 248/4 261/11 273/22 282/13 284/10 284/11 284/18 284/20 285/3 287/20 291/7 291/9 294/7 294/9 296/18 305/15 315/15 335/2 336/4 337/2 342/9 343/8 343/15 344/1 348/6 350/10 350/18 359/14 361/25 363/21 367/10 368/14 370/11 370/15 370/21 372/5 382/22 385/9 391/22 392/2 392/14 392/15 394/4 406/16 410/20 412/4 413/12 414/14 416/22 saying [44] 231/16 235/25 236/9 237/17 238/1 244/8 244/15 245/4 245/6 245/7 245/8 245/21 250/2 253/7 262/12 263/19 265/3 273/14 273/16 274/9 277/22 281/5 283/1 284/15 285/18 285/18 286/22 288/4 292/8 293/2 294/22 295/14 300/19 316/4 318/5 321/9 350/20 371/20 379/13 386/1 413/19 418/22 420/1 423/2 sayings [2] 285/24 285/25 says [56] 231/4 231/6 231/8 231/10 231/12 242/11 242/15 242/16 248/24 249/2 249/10
---	--	--	--

S	306/1 306/6 306/8 311/4 311/5	sharp [1] 300/19	424/10
says... [45] 252/10 253/1 254/6	311/7 311/13 311/13 311/19	she [1] 224/18 252/21	single [1] 370/14
264/25 265/4 271/4 273/10	319/14 342/22 342/25 351/8	261/15 265/21 269/21 272/1	sir [10] 241/11 257/5 257/12
273/12 273/23 277/3 317/10	352/15 353/23 362/20 362/25	272/2 272/12 273/10 273/11	265/13 290/16 349/23 393/14
335/4 336/2 336/11 336/15	369/14 378/9 380/2 383/9 386/19	273/23 274/20 275/5 277/5 283/3	393/19 424/22 424/23
340/16 340/24 348/2 348/13	389/1 395/25 396/23 405/11	284/18 290/21 290/22 297/17	sister [14] 271/12 272/5 272/10
353/21 354/21 357/15 360/14	405/19 406/23 407/19 408/20	297/18 298/18 301/7 301/9	272/11 272/20 273/12 317/10
361/9 366/13 366/22 373/25	408/24 409/5 410/5 413/9 413/15	301/20 316/4 318/24 319/3 320/4	317/18 319/13 319/24 323/19
374/6 386/1 395/14 395/15 396/7	417/1 417/5 422/23 427/4	320/13 335/4 336/11 338/24	334/24 335/3 335/16
396/17 397/2 398/1 398/13	seeing [3] 223/23 304/13 401/15	351/20 351/22 370/2 378/7 386/8	sister's [1] 273/7
398/19 402/4 402/9 402/11	seem [4] 223/19 376/10 387/20	408/6 408/20 408/24 409/7 411/7	sit [4] 262/18 262/21 271/19
403/14 406/2 407/8 408/9 413/16	388/11	411/11 411/20 411/24 412/2	274/17
scale [6] 344/1 367/1 367/7	seemed [3] 290/25 334/15	412/14 412/20 413/15 413/19	sitting [3] 233/17 235/7 349/12
367/14 367/14 396/20	361/14	413/22 413/25 414/10 422/3	situation [30] 227/11 231/18
Scales [1] 407/6	seeming [1] 362/4	422/13 422/20 426/8 426/9	236/18 242/1 242/13 242/23
scalp [1] 301/11	seemingly [1] 301/10	she'll [1] 271/23	243/17 250/15 254/12 254/13
scan [20] 375/4 377/25 378/3	seems [5] 286/15 306/23 372/2	she's [6] 234/1 234/11 251/5	255/11 263/13 266/12 274/25
379/17 379/17 379/19 379/25	388/16 405/23	293/2 320/14 423/19	275/9 280/17 281/15 286/8
380/3 380/17 380/23 381/7	seen [7] 241/9 267/5 292/12	sheer [1] 272/2	292/18 312/14 312/17 342/22
381/12 382/10 382/12 382/13	324/17 372/13 394/13 412/7	sheet [1] 351/14	343/18 344/6 344/10 347/7
382/18 382/21 385/20 385/24	sees [1] 297/6	shine [2] 254/6 284/15	350/10 400/2 415/9 415/19
386/3	segregated [1] 416/14	shines [1] 284/15	situational [1] 279/5
scanning [1] 398/3	selecting [1] 320/15	shop [3] 311/21 315/23 317/14	situations [5] 301/21 308/14
scenario [1] 408/13	self [6] 289/2 289/5 298/9 298/9	shopping [7] 312/1 315/21 316/1	412/24 415/16 416/21
schedule [3] 307/13 322/25	315/3 334/23	318/3 318/9 318/11 318/25	six [7] 258/7 305/17 367/19
426/7	self-care [3] 298/9 298/9 315/3	shops [1] 312/3	367/20 403/1 404/18 405/7
schedules [2] 307/10 307/12	self-direction [3] 289/2 289/5	short [3] 314/6 391/23 404/9	six-year-old [2] 404/18 405/7
scheduling [2] 349/15 425/20	334/23	shortcuts [2] 234/17 234/22	sixth [1] 226/6
SCHEIDER [1] 218/20	selling [2] 325/8 325/9	shortly [1] 403/21	skills [25] 248/25 278/21 278/24
school [8] 230/25 280/10 301/5	send [2] 222/1 269/22	should [26] 234/20 249/12 252/3	281/2 289/10 298/3 308/25
301/6 339/5 348/25 366/24 403/5	sends [1] 252/10	252/3 256/7 258/11 279/6 292/24	322/24 323/1 323/15 323/16
science [1] 419/15	sense [15] 257/15 270/3 283/6	304/7 305/15 326/4 342/11 345/8	325/1 325/3 368/19 387/21 388/1
scope [6] 378/3 383/19 383/20	292/21 295/22 323/1 330/4 330/7	347/17 348/5 350/15 350/23	394/16 396/4 401/16 401/20
384/16 384/16 396/9	330/9 330/10 341/7 341/11	357/16 374/1 379/9 390/17 413/3	402/5 402/9 402/12 402/18 405/1
score [24] 345/15 366/25 367/1	375/10 394/11 399/25	419/23 420/3 424/16 426/14	skip [2] 238/21 270/14
367/7 367/7 367/12 367/16	sent [5] 307/9 307/16 308/2	should've [1] 356/9	sleepy [2] 238/24 239/22
369/23 369/24 370/5 370/13	316/8 330/8	shouldn't [2] 233/16 235/6	slide [19] 337/19 337/23 341/22
370/15 370/24 371/6 371/8	sentence [4] 230/11 231/14	show [24] 222/6 237/3 244/16	341/22 350/12 359/4 359/10
371/19 397/2 398/8 406/23	272/23 284/10	244/24 263/19 271/23 286/13	359/15 359/18 359/20 359/22
408/12 409/11 410/23 414/2	sentences [4] 226/9 226/12	288/20 290/10 292/12 302/14	360/11 365/1 365/2 365/5 365/9
414/8	226/15 230/21	310/4 310/6 310/21 327/12 334/5	365/11 407/5 415/2
scored [1] 411/1	separate [3] 229/6 260/9 411/12	343/7 352/23 375/18 375/19	Slide 57 [1] 365/2
scores [38] 275/20 351/14	separately [1] 251/21	377/10 384/20 392/11 399/23	Slide 97 [1] 341/22
356/20 363/12 363/14 367/10	September [1] 314/6	showed [5] 247/1 306/10 313/7	slides [10] 275/24 288/7 341/13
367/14 367/14 367/20 367/24	series [5] 226/12 230/21 251/5	404/14 423/7	341/21 372/5 380/18 380/19
368/3 368/17 368/20 369/4	355/19 372/9	shower [1] 302/4	406/19 407/3 414/13
369/11 369/22 369/23 370/2	serious [19] 249/7 267/2 267/3	showered [1] 302/3	slower [1] 401/7
370/7 370/10 372/10 372/14	267/6 267/14 268/19 268/21	showing [9] 229/4 255/22 275/3	slowly [1] 235/3
395/2 395/4 397/5 397/14 397/16	268/23 269/7 269/8 272/8 272/15	336/18 336/23 336/24 347/11	small [4] 299/20 314/15 415/21
397/17 397/18 398/11 406/16	276/23 277/11 291/7 291/9	361/4 376/16	417/7
406/17 406/23 406/25 408/20	378/12 391/11 391/12	shows [9] 236/17 363/6 375/19	smart [1] 277/7
408/21 410/21 422/3	seriousness [1] 284/7	377/2 377/14 379/5 391/3 401/16	smile [4] 238/24 239/4 239/7
scoring [6] 372/23 407/20	services [1] 312/2	403/11	239/22
408/11 409/2 409/12 410/2	session [1] 220/5	shy [1] 233/14	snapshot [2] 371/2 377/18
screen [6] 229/5 229/10 230/4	set [4] 226/7 330/11 359/5 365/6	sidewalks [1] 312/5	so [242]
267/24 304/17 361/1	sets [1] 354/25	sign [1] 271/23	social [16] 278/8 278/21 278/24
screens [1] 304/16	setting [6] 393/24 394/16 396/4	signed [1] 413/15	278/24 279/21 280/2 280/21
seat [1] 393/14	415/25 416/7 416/10	significance [1] 388/3	281/25 289/10 298/3 323/6
seated [3] 220/19 327/3 393/11	seven [3] 352/8 384/24 386/5	significant [6] 338/10 338/13	340/18 397/4 397/12 398/21
second [17] 230/11 233/18 237/6	several [2] 384/2 386/23	374/23 387/21 390/10 405/6	402/2
244/25 245/1 265/9 281/21	severe [3] 324/2 343/13 348/15	significantly [1] 398/15	socialize [1] 298/6
284/10 290/24 307/16 334/20	severely [1] 282/8	similar [6] 225/3 273/15 278/6	society [1] 315/9
359/11 359/22 365/14 367/16	Shapiro [33] 223/3 230/3 230/18	278/17 318/13 372/3	sociolinguistics [1] 361/6
404/2 404/20	233/4 235/14 254/1 259/24 261/8	similarities [1] 397/13	SOLOWAY [1] 218/20
section [2] 362/1 403/13	262/3 265/8 265/9 290/18 291/7	Similarly [1] 342/4	solution [3] 221/25 222/2 222/19
sectional [1] 384/22	297/4 304/12 319/13 319/19	simple [6] 226/9 226/12 250/4	solve [1] 374/4
Security [1] 323/6	319/21 327/11 327/22 333/2	282/18 334/11 415/5	solving [3] 336/14 337/20 363/13
sedative [1] 387/14	335/15 338/1 338/6 345/14	simply [6] 231/23 234/6 251/15	some [86] 223/7 228/22 230/5
see [56] 224/7 225/6 233/11	346/11 352/7 375/12 379/14	255/12 347/18 379/13	233/13 234/9 234/11 236/4
235/18 242/8 247/14 268/7 272/5	386/8 386/13 419/6 424/3	since [16] 223/5 223/9 223/12	236/11 240/15 242/4 246/14
272/17 284/9 286/6 296/21	Shapiro's [1] 406/2	278/18 293/21 297/14 305/1	250/4 250/14 252/3 256/11 264/4
301/20 304/7 305/6 305/9 305/22	share [6] 272/2 273/11 273/13	311/8 313/20 347/6 352/15	271/7 275/16 277/9 277/18
	273/19 340/13 343/4	354/15 358/15 373/12 408/19	

<p>S some... [66] 277/21 281/20 284/15 285/1 286/13 289/1 289/9 290/6 290/22 299/6 300/9 301/8 302/18 305/19 315/2 315/3 316/15 325/13 335/25 336/14 338/24 341/13 341/14 343/5 346/2 347/16 351/21 357/24 364/10 364/23 369/19 370/18 370/19 370/20 371/19 372/15 372/23 372/23 373/6 373/7 375/2 377/2 387/10 387/12 391/23 392/13 399/7 399/23 401/4 401/21 401/22 402/8 402/11 403/8 406/16 406/19 410/11 410/12 411/7 417/2 418/10 419/7 420/18 420/24 422/2 426/7 somebody [32] 231/19 231/25 232/8 234/9 238/2 243/13 247/17 265/3 265/4 266/15 282/8 287/5 287/22 289/8 289/21 297/6 298/6 302/2 308/9 308/17 315/3 318/12 318/12 328/20 334/1 334/17 337/14 337/15 343/9 344/1 344/6 385/13 somebody's [1] 293/19 somehow [3] 221/22 221/24 410/22 someone [52] 223/24 224/13 225/20 226/7 226/15 226/22 227/10 228/6 228/7 235/10 237/8 237/20 237/21 240/9 243/1 243/5 243/5 247/19 252/25 255/16 273/19 277/16 282/12 282/14 287/14 287/20 287/25 289/22 289/23 292/8 292/10 294/2 294/3 302/4 308/19 309/13 315/5 324/2 324/7 328/16 337/4 343/19 343/23 348/4 371/15 377/11 388/18 401/3 401/24 402/14 415/22 425/2 someone's [1] 362/2 someplace [1] 232/11 something [56] 222/4 222/5 222/12 222/21 227/12 227/15 228/6 233/13 233/15 236/5 236/17 239/19 243/1 243/3 243/3 245/5 247/3 251/15 252/25 255/18 255/19 262/16 266/14 269/11 271/5 271/23 273/21 275/23 277/15 279/25 280/1 282/7 282/22 285/21 286/7 290/8 290/9 295/7 307/22 307/25 308/14 311/25 317/11 318/24 325/25 337/9 337/15 347/17 349/2 366/16 379/18 387/17 399/20 399/23 405/13 424/15 somethings [1] 282/24 sometime [1] 285/15 sometimes [11] 228/17 228/18 277/12 277/18 277/21 278/16 281/18 282/24 285/11 314/8 379/12 somewhat [1] 414/16 somewhere [2] 226/6 286/8 son [3] 331/25 332/1 336/4 song [16] 235/11 235/18 235/20 236/21 236/25 239/24 240/5 254/10 267/10 271/22 275/1 275/5 275/5 275/8 275/8 275/12 songs [5] 236/22 275/3 389/5 390/3 390/13</p>	<p>soon [1] 354/7 sorry [62] 223/11 224/17 227/18 233/20 237/11 238/9 243/19 249/3 253/15 258/14 260/12 261/8 261/11 261/18 263/22 266/6 266/21 270/21 271/3 276/8 276/11 276/12 276/13 277/2 277/20 281/17 282/13 285/6 291/4 295/7 299/25 301/4 303/25 304/15 307/4 307/23 310/19 314/25 316/7 316/18 316/24 318/7 319/22 319/23 321/13 325/19 326/1 330/6 332/21 333/8 352/6 354/2 357/7 358/22 359/17 367/13 370/6 392/22 392/24 412/25 420/16 424/5 sort [6] 248/5 278/2 290/6 320/1 401/13 425/12 sorts [2] 234/2 298/10 sought [1] 347/6 soul [2] 291/20 293/6 sound [1] 260/17 sounded [1] 361/13 sounds [3] 222/19 234/6 234/10 sources [3] 359/10 392/5 406/22 span [1] 403/13 spat [1] 281/21 speak [8] 227/23 246/22 255/20 294/9 297/11 297/11 323/9 416/4 speaking [1] 265/20 speaks [4] 247/15 365/25 380/21 404/25 special [5] 219/12 220/14 340/18 377/4 404/12 specializes [3] 334/5 340/3 340/7 specific [17] 224/3 224/17 227/6 227/6 236/7 236/24 239/21 248/14 282/11 282/14 325/3 328/4 348/19 351/10 351/10 407/13 417/17 specifically [5] 288/13 316/3 346/14 401/13 423/14 speculate [2] 377/17 377/23 speculating [2] 262/11 292/13 speculation [7] 381/15 385/7 385/11 385/15 385/18 412/9 412/18 speculative [1] 381/18 speech [1] 339/18 speech-and-language [1] 339/18 Speed [1] 261/24 spelled [2] 234/11 277/8 spelling [1] 272/23 spells [1] 319/15 spend [2] 270/5 363/4 spent [1] 381/1 sphere [1] 398/4 spit [1] 282/3 split [1] 329/16 spoke [7] 223/5 258/15 323/5 331/14 352/14 356/2 415/8 spoken [2] 269/3 333/22 spot [1] 226/24 spread [1] 412/10 stakes [2] 262/24 331/17 stamp [3] 251/4 251/7 252/4 stamped [2] 251/12 302/9 stamps [1] 251/12 stance [1] 334/19 stand [11] 223/9 257/2 257/3 265/10 265/14 290/16 291/5 358/10 393/7 393/9 424/22</p>	<p>standard [9] 363/16 367/15 419/23 420/4 424/16 standardization [3] 352/2 357/23 423/6 standards [4] 255/11 359/6 366/10 366/16 stands [1] 290/17 start [7] 230/12 238/2 261/25 359/11 359/24 426/19 426/24 started [4] 248/2 338/24 352/11 374/12 starts [1] 233/7 state [3] 336/8 376/22 388/4 stated [1] 406/8 statement [12] 232/6 232/7 232/10 298/24 306/25 310/6 318/21 319/4 321/19 356/4 361/9 387/23 statements [2] 293/11 388/2 STATES [10] 218/1 218/2 218/5 218/12 218/15 218/17 220/3 220/8 220/12 220/13 station [1] 231/24 stations [1] 312/3 statistics [2] 380/9 380/10 status [2] 361/2 362/2 stay [4] 271/24 284/11 284/17 289/13 stereography [1] 219/20 step [3] 249/8 264/22 332/14 stereotyped [1] 389/2 stereotypes [1] 374/2 STERN [5] 218/20 218/22 220/18 221/13 257/4 stick [3] 232/13 278/19 384/7 still [21] 220/21 226/8 228/13 233/10 236/4 257/11 268/17 271/11 271/18 274/17 281/3 285/12 316/16 327/7 337/8 338/10 338/13 338/17 373/1 383/6 417/25 stipulated [1] 324/6 stipulation [3] 302/19 302/21 302/22 stop [6] 233/18 236/2 271/25 332/21 336/5 336/16 store [3] 316/5 316/8 316/9 stores [1] 312/1 stove [1] 321/6 straight [1] 251/4 straighten [1] 425/12 strategize [1] 309/15 strategy [2] 309/12 309/20 stream [1] 226/11 Street [3] 218/21 219/2 219/7 streets [1] 312/5 strength [6] 244/6 244/16 244/24 271/15 271/16 274/3 stretching [1] 411/24 strike [4] 243/4 266/22 294/8 405/22 string [1] 226/9 stringing [2] 230/21 361/16 strong [2] 269/1 271/25 structure [1] 272/23 structured [4] 255/18 280/17 281/6 401/25 structures [1] 390/9 struggling [1] 245/13 students [2] 301/15 305/10 studies [3] 414/14 414/24 415/2 study [1] 407/8</p>	<p>stuff [2] 257/9 329/7 269/8 274/23 303/11 334/9 345/1 347/3 355/20 submit [1] 329/25 submitted [2] 303/17 329/21 subscale [1] 363/12 subsequent [5] 358/2 368/6 409/6 418/14 418/18 substance [1] 390/23 substantial [8] 228/19 272/17 344/7 364/4 369/4 377/14 399/9 426/15 substantially [2] 272/24 286/20 substitute [1] 374/3 subtest [10] 395/3 396/21 397/16 397/17 398/2 398/6 408/8 408/13 408/13 408/17 subtests [9] 396/20 397/3 397/10 410/13 410/15 410/17 410/25 411/1 411/5 successful [6] 322/25 323/2 323/15 325/1 402/10 402/12 succession [1] 332/11 such [9] 233/12 280/17 292/12 314/10 340/17 363/10 368/18 376/11 415/9 sucked [1] 395/16 suffered [2] 375/3 376/12 suffering [2] 383/15 384/3 sufficient [2] 346/25 418/12 suggest [3] 298/24 298/25 415/3 suggested [4] 361/22 364/7 384/17 389/7 suggests [3] 281/24 368/3 375/8 Suite [2] 218/21 219/2 summary [5] 279/14 351/14 383/10 388/5 401/14 sun [2] 284/14 284/15 sunglasses [1] 316/17 superficial [4] 224/4 269/2 269/6 391/2 superimposed [3] 344/16 344/23 345/17 support [1] 274/7 supportive [2] 289/17 291/12 supports [1] 340/20 suppose [1] 239/20 supposed [2] 387/8 412/4 Supreme [1] 415/10 sure [43] 222/1 222/2 222/7 227/25 229/12 230/22 235/4 237/19 239/10 245/9 246/18 247/12 250/1 250/3 256/13 257/17 265/12 272/13 274/11 281/19 283/15 285/11 292/5 302/2 303/10 305/3 305/24 318/8 319/18 325/7 325/9 328/3 330/11 333/18 335/8 353/9 359/4 365/6 406/5 414/19 422/25 425/13 426/4 surface [3] 239/14 239/17 277/16 Sweetheart [1] 233/8 switch [1] 304/1 Switzky [1] 360/6 symbol [1] 268/10 symptoms [3] 342/23 343/4 379/22 synagog [1] 312/4 syndrome [1] 227/7 syntax [3] 360/15 361/5 362/8 system [1] 251/7</p>
---	---	---	--

<p>S systematic [1] 424/13</p>	<p>tasks [1] 225/25 taught [1] 394/11 teach [2] 255/19 323/22</p>	<p>364/13 366/17 368/6 368/11 369/5 379/4 379/4 407/18 408/19 409/16 409/17 409/23 410/5 410/16 411/10 411/12 411/19 411/20 413/2 413/5 415/15 415/19 418/14 418/18 420/4 425/24 tests [19] 258/5 258/11 334/6 353/18 354/22 355/1 363/12 365/21 368/3 368/18 371/1 385/10 398/2 407/12 407/17 410/8 410/17 415/1 418/13 Tethering [1] 353/12 than [28] 232/2 234/14 261/15 272/20 272/24 273/8 292/25 294/22 308/4 310/10 318/5 325/20 344/18 346/7 350/11 350/13 351/2 351/2 361/7 363/17 392/11 396/15 397/16 399/15 416/8 418/3 424/14 426/9 thank [49] 221/10 222/23 229/17 234/19 234/23 238/19 241/8 244/3 246/7 252/7 254/4 256/9 257/8 257/13 258/3 259/19 259/21 262/4 270/23 283/20 283/24 303/23 306/12 317/2 326/6 326/8 326/9 332/15 337/25 338/1 349/20 352/24 353/15 359/20 364/19 364/21 381/13 382/5 393/4 393/8 393/15 393/20 406/13 418/4 418/24 424/20 424/23 427/1 427/3 that [1117]</p>	<p>343/15 343/15 343/16 343/20 343/20 343/20 343/20 343/20 379/9 388/16 402/21 theirs [2] 273/14 337/5 them [55] 221/1 221/3 222/16 226/9 229/5 229/16 232/19 238/4 241/6 242/12 251/13 251/16 251/17 251/18 251/21 252/3 254/23 255/21 275/9 278/5 278/14 278/18 289/15 290/5 290/9 294/11 302/8 302/9 302/14 303/7 303/17 303/19 311/3 317/15 321/8 329/6 338/22 343/5 348/6 351/21 370/18 370/19 370/20 386/13 390/3 400/8 416/14 422/8 425/2 425/3 425/6 425/6 425/6 425/7 425/9 themes [2] 390/3 390/12 themselves [3] 235/23 315/5 321/4 then [91] 221/20 221/20 221/20 222/24 225/1 225/5 227/6 228/15 231/5 231/8 231/11 232/13 235/17 236/7 242/11 244/15 245/10 247/6 247/20 248/5 250/9 251/23 253/13 261/19 263/2 265/1 269/22 273/23 274/25 275/14 276/24 277/24 278/10 280/8 280/21 284/16 285/21 286/16 287/7 287/9 290/5 290/6 299/19 303/20 307/15 314/5 314/7 328/14 329/7 334/14 334/15 334/17 336/3 336/5 343/20 346/2 347/3 350/23 352/4 352/5 352/13 354/25 355/10 357/20 361/19 361/25 362/17 370/7 385/13 385/15 396/13 396/17 398/1 398/13 398/18 399/9 401/18 402/4 403/13 404/7 407/14 408/11 408/17 415/6 416/22 416/22 417/20 424/13 425/23 426/1 426/24 Theodore [3] 246/10 246/12 246/20 therapeutic [1] 400/11 therapy [1] 339/21 there [165] 221/2 228/10 230/12 233/14 234/12 235/8 236/4 236/22 239/21 239/24 241/1 242/9 243/9 244/6 244/9 245/8 250/9 251/8 251/21 251/24 252/15 252/16 258/7 259/18 260/10 263/15 264/8 267/3 272/19 274/7 276/15 277/18 278/2 279/13 280/14 283/16 283/17 284/17 284/18 285/7 286/1 287/3 287/20 288/4 288/8 288/10 289/14 290/15 290/19 292/3 295/17 295/25 298/24 299/2 299/6 299/6 299/19 299/20 300/6 300/9 300/9 300/18 301/5 301/5 301/6 302/16 302/17 302/18 302/21 309/5 310/11 311/2 311/19 313/23 315/11 317/14 323/5 323/18 328/11 328/11 328/12 328/12 328/14 328/19 328/22 329/21 332/10 332/12 333/20 338/6 338/24 340/9 341/3 341/8 346/7 350/15 351/10 352/11 353/6 353/17 355/13 357/17 357/24 358/1 359/24 360/6 360/7 360/11 361/21 362/14 362/24 365/12</p>
<p>T T-O-O [1] 233/25 Tab [1] 248/21 table [7] 311/5 353/6 353/17 353/19 353/20 353/20 353/23 tabs [1] 229/4 take [48] 221/20 227/20 228/21 232/14 237/6 238/6 238/23 241/11 243/19 245/22 246/17 247/9 250/21 256/11 256/13 258/21 260/4 265/13 267/14 268/9 270/9 274/10 276/22 278/13 280/8 280/24 285/11 291/13 302/4 304/10 326/4 326/5 333/16 333/23 333/24 334/13 334/24 335/1 335/3 335/16 336/16 343/22 349/18 393/2 406/11 406/12 417/14 418/15 taken [11] 221/24 256/14 302/18 302/22 303/7 304/12 304/22 305/17 363/15 377/19 418/22 takes [9] 220/6 228/13 228/14 245/9 252/17 301/10 327/1 329/19 329/24 taking [15] 254/7 262/7 266/19 275/12 299/16 303/25 334/21 361/7 371/2 381/10 381/21 381/22 381/22 418/13 420/5 talk [49] 223/17 223/17 224/25 230/9 232/12 235/24 247/24 247/24 262/15 262/18 262/21 268/22 269/10 270/4 270/4 271/23 276/1 276/24 277/3 277/9 285/4 285/10 292/7 293/15 295/24 296/9 297/21 297/24 297/25 300/23 307/20 307/20 309/1 309/4 311/17 315/21 334/9 341/21 379/17 379/25 380/5 381/5 383/22 384/12 391/2 391/3 406/22 407/4 416/5 talked [28] 221/14 223/7 223/14 237/8 266/25 267/9 293/13 293/17 293/21 300/4 312/23 316/6 331/3 333/12 337/19 361/18 364/3 368/9 378/7 385/20 406/8 406/25 407/5 409/3 409/12 414/4 419/6 420/16 talking [61] 228/2 228/21 231/17 235/14 235/16 235/17 238/3 247/22 248/8 253/1 253/2 258/4 259/23 265/3 265/4 269/14 271/12 274/6 274/22 274/23 274/24 275/17 278/3 285/12 285/14 288/13 290/1 291/22 318/3 320/23 323/24 328/2 329/3 329/10 329/12 330/3 331/24 333/6 333/9 334/17 334/21 335/17 335/18 336/5 336/16 346/6 361/19 364/5 379/22 388/14 389/6 392/10 394/8 397/24 400/10 401/5 406/1 417/2 417/8 417/10 418/2 talks [5] 235/17 247/6 261/9 335/19 346/15 tantrums [1] 403/12 tap [1] 259/9 tape [2] 333/19 359/2 tape-recorded [1] 359/2 tapes [2] 388/3 388/22</p>	<p>teachers [1] 340/18 team [3] 339/12 339/15 341/11 tears [5] 235/11 235/18 236/15 267/11 268/6 technique [2] 415/5 415/18 techniques [2] 390/4 415/17 telephone [3] 219/19 361/11 408/14 television [4] 292/23 388/24 392/7 392/11 tell [32] 223/23 224/5 240/9 250/9 263/6 271/20 271/24 271/24 274/18 283/10 286/12 307/14 335/24 343/10 349/17 368/1 368/23 369/10 382/11 383/14 386/4 390/5 390/7 390/14 390/16 399/4 410/1 411/4 412/20 413/1 413/24 414/25 telling [6] 247/8 253/1 289/8 289/12 333/16 335/24 tells [6] 254/5 290/21 291/13 291/16 319/13 334/13 ten [8] 273/21 276/10 278/10 313/24 320/22 385/14 409/6 411/14 tend [1] 400/16 term [9] 223/16 227/2 270/3 289/25 328/16 328/22 328/23 328/24 350/22 termed [2] 255/25 288/24 terminate [1] 294/19 terminating [3] 279/2 279/2 298/7 terms [53] 224/3 225/6 226/7 226/12 232/4 253/5 255/9 273/15 280/15 285/2 285/7 285/25 286/14 287/7 293/22 295/11 298/2 323/13 325/23 334/22 337/11 341/24 343/23 349/6 355/9 356/20 361/16 363/20 368/24 369/10 374/6 374/23 375/2 375/9 375/17 377/10 377/11 380/13 382/11 383/14 386/19 390/7 391/1 391/4 392/1 393/24 394/2 396/9 400/8 414/6 414/11 416/24 418/1 terribly [1] 391/11 test [39] 255/22 296/23 333/17 333/23 333/24 334/7 334/10 334/10 334/13 335/25 336/3 336/16 354/22 354/24 357/25 365/17 367/6 368/9 368/12 369/25 370/20 372/3 375/13 375/22 381/25 382/1 392/2 395/5 395/6 408/1 409/3 411/24 412/1 412/8 412/9 412/14 413/22 417/14 418/15 tested [10] 255/21 260/25 275/20 288/10 357/23 367/3 396/19 397/3 413/16 413/19 testers [1] 415/17 testified [12] 237/12 239/11 240/8 255/10 255/15 358/10 376/23 377/24 379/11 422/11 422/13 422/13 testify [6] 414/18 414/22 414/22 419/10 421/4 422/13 testifying [2] 414/17 414/17 testimony [7] 223/6 224/2 239/14 286/9 286/10 346/2</p>	<p>364/13 366/17 368/6 368/11 369/5 379/4 379/4 407/18 408/19 409/16 409/17 409/23 410/5 410/16 411/10 411/12 411/19 411/20 413/2 413/5 415/15 415/19 418/14 418/18 420/4 425/24 tests [19] 258/5 258/11 334/6 353/18 354/22 355/1 363/12 365/21 368/3 368/18 371/1 385/10 398/2 407/12 407/17 410/8 410/17 415/1 418/13 Tethering [1] 353/12 than [28] 232/2 234/14 261/15 272/20 272/24 273/8 292/25 294/22 308/4 310/10 318/5 325/20 344/18 346/7 350/11 350/13 351/2 351/2 361/7 363/17 392/11 396/15 397/16 399/15 416/8 418/3 424/14 426/9 thank [49] 221/10 222/23 229/17 234/19 234/23 238/19 241/8 244/3 246/7 252/7 254/4 256/9 257/8 257/13 258/3 259/19 259/21 262/4 270/23 283/20 283/24 303/23 306/12 317/2 326/6 326/8 326/9 332/15 337/25 338/1 349/20 352/24 353/15 359/20 364/19 364/21 381/13 382/5 393/4 393/8 393/15 393/20 406/13 418/4 418/24 424/20 424/23 427/1 427/3 that [1117] that's [144] 221/25 222/10 224/6 224/7 226/6 226/25 226/25 227/2 227/12 228/6 228/6 228/18 230/8 230/23 232/3 233/7 233/11 234/7 234/8 234/13 238/24 242/15 242/16 244/16 245/3 245/3 245/19 247/22 247/23 248/2 248/3 248/17 249/2 250/14 254/3 255/18 260/14 262/10 265/18 266/2 266/3 266/3 266/6 266/14 267/2 268/11 269/13 269/21 269/23 270/11 272/18 273/6 273/21 275/9 275/11 276/10 277/9 277/15 277/22 280/1 280/12 282/25 283/4 283/18 288/12 289/2 293/8 295/7 295/24 296/17 296/23 297/14 298/24 302/19 305/3 305/24 307/22 307/25 308/10 308/14 308/21 310/3 311/16 311/24 312/6 314/1 318/2 322/16 324/6 325/13 325/13 329/8 329/16 332/4 335/17 336/3 336/6 337/9 337/10 340/15 345/21 346/1 346/8 346/17 347/13 348/7 349/1 349/3 349/4 352/14 352/17 352/17 352/18 353/13 354/3 356/24 358/4 358/11 370/2 375/21 378/13 379/18 379/24 380/4 380/15 380/25 381/2 393/25 394/3 395/3 395/7 395/8 396/16 400/16 404/5 404/23 406/17 407/12 408/21 412/11 413/19 418/4 419/24 423/3 theater [2] 312/10 312/12 theaters [1] 312/5 their [25] 226/19 227/3 228/16 251/7 255/20 271/8 287/19 292/6 294/3 315/5 325/13 339/4 340/24</p>	<p>343/15 343/15 343/16 343/20 343/20 343/20 343/20 343/20 379/9 388/16 402/21 theirs [2] 273/14 337/5 them [55] 221/1 221/3 222/16 226/9 229/5 229/16 232/19 238/4 241/6 242/12 251/13 251/16 251/17 251/18 251/21 252/3 254/23 255/21 275/9 278/5 278/14 278/18 289/15 290/5 290/9 294/11 302/8 302/9 302/14 303/7 303/17 303/19 311/3 317/15 321/8 329/6 338/22 343/5 348/6 351/21 370/18 370/19 370/20 386/13 390/3 400/8 416/14 422/8 425/2 425/3 425/6 425/6 425/6 425/7 425/9 themes [2] 390/3 390/12 themselves [3] 235/23 315/5 321/4 then [91] 221/20 221/20 221/20 222/24 225/1 225/5 227/6 228/15 231/5 231/8 231/11 232/13 235/17 236/7 242/11 244/15 245/10 247/6 247/20 248/5 250/9 251/23 253/13 261/19 263/2 265/1 269/22 273/23 274/25 275/14 276/24 277/24 278/10 280/8 280/21 284/16 285/21 286/16 287/7 287/9 290/5 290/6 299/19 303/20 307/15 314/5 314/7 328/14 329/7 334/14 334/15 334/17 336/3 336/5 343/20 346/2 347/3 350/23 352/4 352/5 352/13 354/25 355/10 357/20 361/19 361/25 362/17 370/7 385/13 385/15 396/13 396/17 398/1 398/13 398/18 399/9 401/18 402/4 403/13 404/7 407/14 408/11 408/17 415/6 416/22 416/22 417/20 424/13 425/23 426/1 426/24 Theodore [3] 246/10 246/12 246/20 therapeutic [1] 400/11 therapy [1] 339/21 there [165] 221/2 228/10 230/12 233/14 234/12 235/8 236/4 236/22 239/21 239/24 241/1 242/9 243/9 244/6 244/9 245/8 250/9 251/8 251/21 251/24 252/15 252/16 258/7 259/18 260/10 263/15 264/8 267/3 272/19 274/7 276/15 277/18 278/2 279/13 280/14 283/16 283/17 284/17 284/18 285/7 286/1 287/3 287/20 288/4 288/8 288/10 289/14 290/15 290/19 292/3 295/17 295/25 298/24 299/2 299/6 299/6 299/19 299/20 300/6 300/9 300/9 300/18 301/5 301/5 301/6 302/16 302/17 302/18 302/21 309/5 310/11 311/2 311/19 313/23 315/11 317/14 323/5 323/18 328/11 328/11 328/12 328/12 328/14 328/19 328/22 329/21 332/10 332/12 333/20 338/6 338/24 340/9 341/3 341/8 346/7 350/15 351/10 352/11 353/6 353/17 355/13 357/17 357/24 358/1 359/24 360/6 360/7 360/11 361/21 362/14 362/24 365/12</p>

<p>T there... [53] 365/16 366/10 366/11 367/9 371/24 373/13 375/17 375/23 377/18 378/16 378/20 379/22 382/12 382/20 386/2 386/19 389/3 390/3 391/22 391/23 394/15 398/8 398/22 399/8 399/24 400/7 400/7 400/21 401/2 402/23 404/3 404/20 409/5 410/11 410/12 410/20 412/7 412/20 412/23 413/21 414/3 414/12 414/25 415/16 415/16 415/17 416/20 417/24 424/3 424/6 424/13 424/16 425/4 there's [43] 221/4 234/17 242/9 282/11 282/13 282/14 283/9 284/17 285/24 289/14 304/7 308/4 321/3 324/19 328/8 333/18 346/14 347/21 348/22 348/24 350/23 362/18 362/24 365/15 369/3 370/11 371/11 371/22 375/14 376/6 378/10 381/11 381/11 383/23 385/8 389/4 389/6 395/2 406/2 413/21 423/23 424/3 426/20 therefore [5] 280/5 345/5 347/9 373/12 379/9 these [85] 221/7 228/22 229/3 229/5 230/6 230/6 230/9 232/9 234/21 236/15 239/20 240/20 241/5 248/6 253/14 254/15 254/17 254/19 255/7 255/14 255/23 255/23 255/25 256/6 262/14 262/19 262/21 264/20 275/16 277/24 278/13 281/4 286/2 288/20 289/9 293/19 300/4 301/18 302/11 302/18 302/24 302/24 302/25 303/16 307/19 308/2 321/16 323/9 330/17 333/7 337/18 340/24 345/15 357/15 365/20 370/21 371/1 372/12 373/11 374/20 375/13 376/4 378/4 378/5 378/8 379/8 379/15 380/9 381/23 384/21 386/9 400/7 400/19 401/17 405/3 406/16 407/12 412/13 412/24 412/24 414/7 415/1 415/21 418/13 420/20 they [137] 222/1 223/16 223/16 224/14 224/22 224/23 224/24 225/1 225/3 226/1 226/19 226/23 227/4 228/15 228/17 232/10 232/10 235/24 237/9 237/14 237/21 237/23 237/23 237/25 238/1 238/1 238/2 240/10 240/11 246/16 247/24 248/2 248/4 251/14 251/14 254/20 255/8 255/21 256/3 256/4 258/17 258/21 273/13 273/14 278/4 280/18 284/20 284/20 287/15 287/15 287/16 287/16 287/18 288/1 288/1 288/23 289/22 290/6 292/6 292/7 294/4 294/11 298/4 298/6 302/22 303/21 313/2 313/3 316/7 316/7 316/8 321/6 322/22 322/23 323/5 323/20 323/21 325/14 329/13 331/17 332/10 334/16 339/16 343/20 344/5 348/4 348/7 350/18 350/22 352/2 361/25 366/9 367/21 368/4 368/5 368/5 373/11 373/12 375/14 375/15 375/20 376/3 376/5 378/5</p>	<p>378/10 378/11 378/15 380/4 380/5 381/6 381/6 383/9 388/3 385/3 385/5 385/8 385/8 385/11 387/12 388/15 389/2 394/1 394/4 394/6 396/13 401/3 401/6 401/17 401/20 401/21 401/23 405/14 405/15 411/5 415/4 417/3 426/17 they'll [2] 426/4 426/5 they're [29] 227/11 273/16 274/8 274/22 274/23 274/23 278/6 278/17 303/1 303/4 303/12 303/19 314/9 350/20 360/10 367/20 367/23 375/20 380/9 385/1 387/10 387/14 394/6 402/18 405/13 405/15 405/16 405/17 425/4 they've [2] 324/11 348/23 thing [38] 237/20 238/22 246/11 246/11 246/12 246/14 246/15 255/22 258/3 263/21 272/7 273/14 274/6 274/20 274/22 277/1 277/7 278/4 278/6 285/22 289/1 294/17 304/11 311/3 321/16 370/21 370/22 370/24 371/16 384/6 386/25 387/1 387/2 391/25 405/18 413/2 416/25 417/9 things [78] 225/6 230/13 231/2 239/21 242/2 242/18 263/18 268/18 271/18 274/4 275/3 275/16 275/20 275/23 277/9 277/18 277/21 281/17 281/20 281/20 281/25 284/7 284/12 284/22 284/25 286/2 286/23 286/24 287/1 287/4 288/9 288/10 288/13 288/18 288/21 288/21 292/1 292/7 294/14 296/12 296/23 298/2 298/10 299/23 300/20 312/14 315/1 315/1 315/11 316/5 317/14 320/24 328/15 337/18 338/20 355/14 358/15 368/11 368/14 370/21 378/19 382/16 382/19 382/20 385/22 385/24 386/2 386/20 387/2 389/6 390/8 390/19 394/13 395/14 396/16 406/25 416/23 420/2 think [121] 223/16 224/14 225/4 227/2 228/17 233/9 233/10 234/13 237/15 237/17 239/9 241/9 245/13 247/5 247/16 251/21 255/10 255/24 257/18 257/20 263/16 268/22 272/14 272/16 273/7 274/16 275/10 277/7 279/6 279/6 281/3 283/11 286/17 286/18 286/20 288/7 288/23 289/3 290/25 291/12 292/4 293/10 293/11 294/25 299/14 302/19 303/5 308/10 308/12 308/20 308/24 308/24 309/1 311/12 316/4 321/18 323/18 324/12 330/14 333/18 337/1 340/12 340/12 340/12 341/6 341/14 342/2 345/3 345/9 345/10 346/4 348/8 349/5 350/2 350/4 351/10 356/1 361/10 363/23 363/23 368/11 370/14 371/10 373/17 375/12 375/13 376/22 378/13 381/14 382/2 382/24 385/1 385/19 386/20 386/21 387/3 391/21 395/11 399/6 401/5 405/11 406/7 407/3 409/3 412/6 414/9 414/12 415/21</p>	<p>416/2 416/3 416/6 417/7 417/22 418/2 418/16 424/29 425/22 425/22 426/2 426/10 426/14 thinking [24] 227/13 243/12 246/22 246/24 249/24 250/12 252/17 253/8 255/16 266/17 275/18 286/3 286/22 288/16 288/18 290/10 290/11 310/10 310/13 320/2 334/23 337/21 387/10 387/12 thinks [2] 277/5 320/13 third [3] 359/24 386/25 396/21 Thirty [1] 352/8 Thirty-seven [1] 352/8 this [413] Thorazine [2] 383/7 387/12 those [58] 221/3 225/24 231/17 234/2 241/1 241/3 242/4 242/10 250/11 263/2 275/20 275/23 287/1 287/4 288/10 288/18 288/21 294/14 296/21 298/10 299/2 299/23 300/8 301/19 307/12 307/15 311/23 312/14 315/1 318/11 318/12 334/4 355/10 363/23 364/7 367/10 367/24 369/10 370/10 371/16 373/8 377/6 378/17 388/22 390/4 390/9 394/13 394/19 399/14 399/20 406/24 407/4 408/3 408/15 408/16 411/1 412/10 418/21 though [14] 272/2 273/9 273/11 275/16 280/25 297/1 298/22 300/17 323/13 325/5 348/12 398/14 399/5 409/7 thought [13] 227/1 245/10 272/18 273/6 273/17 273/18 281/11 296/3 325/20 334/20 335/1 374/1 391/25 three [13] 278/14 287/16 321/9 322/11 322/14 322/23 323/7 325/21 359/10 417/4 417/15 425/22 425/22 thriftness [1] 238/4 through [26] 221/1 221/3 221/5 221/7 221/9 230/8 271/17 271/18 271/25 274/3 274/4 274/8 284/14 292/1 311/3 313/24 338/22 346/5 351/20 364/5 364/5 379/16 379/24 381/1 384/20 405/3 throughout [2] 298/22 412/10 thumb [1] 395/17 thus [1] 382/3 tickets [1] 312/12 tightly [1] 301/11 time [90] 230/14 231/6 235/13 251/25 254/6 255/8 256/11 257/16 260/10 260/11 262/3 265/13 268/1 268/14 271/8 271/8 271/9 271/11 271/17 274/4 281/10 282/1 282/6 284/12 285/10 286/6 290/25 295/12 295/17 299/15 300/14 301/14 302/4 311/5 313/23 314/6 314/10 314/15 314/16 315/17 315/20 315/25 316/2 318/10 320/2 321/3 321/18 322/5 322/19 324/8 325/24 325/25 330/22 333/3 338/16 338/21 342/4 342/5 342/6 342/7 358/1 363/5 366/7 369/12 370/18 371/25 374/19 375/23 375/25 377/19 377/25 379/4 381/1 382/11 382/18 384/2</p>	<p>384/21 385/24 386/1 386/24 392/28 394/15 410/28 402/4 417/17 417/18 419/20 420/13 422/20 423/10 time-wise [2] 257/16 325/25 times [8] 298/25 299/2 299/2 300/22 328/14 337/10 372/11 384/2 tired [1] 371/15 title [1] 353/8 to mark [1] 254/18 today [6] 222/7 247/23 333/12 381/8 418/2 419/11 together [12] 226/9 226/13 226/16 229/7 230/17 230/21 238/22 268/8 271/25 284/22 300/19 422/14 told [15] 271/14 271/22 272/1 273/10 273/12 273/23 273/24 274/2 274/2 291/19 295/25 297/21 307/13 327/24 327/25 tomorrow [6] 386/11 425/14 425/18 426/3 426/7 427/4 tonight [2] 386/14 426/25 too [13] 233/19 233/25 270/12 271/21 288/12 299/20 305/23 388/13 388/18 407/9 409/13 418/3 418/3 took [4] 249/13 305/19 383/24 403/1 top [3] 249/5 276/22 317/9 topic [2] 291/9 391/1 total [3] 322/14 323/6 396/9 totally [1] 250/15 touch [2] 320/17 325/21 touches [2] 268/18 284/7 touching [1] 320/1 toward [1] 416/21 track [2] 271/21 274/19 traditionally [1] 343/12 trailed [1] 307/23 traits [1] 371/7 transcript [7] 218/11 219/20 234/22 237/19 303/5 386/1 427/10 Transcription [1] 219/21 transportation [1] 311/21 trauma [2] 382/19 385/24 traveling [1] 311/25 treatment [2] 386/19 387/3 trial [6] 302/24 302/25 303/13 303/14 303/22 378/1 tried [2] 376/3 391/1 tries [1] 334/12 trip [2] 425/2 425/9 trouble [11] 226/15 226/16 226/19 232/9 243/2 285/2 287/8 298/23 324/3 425/10 425/10 true [9] 242/21 242/23 298/24 344/14 361/9 370/15 375/19 375/21 412/1 trust [3] 316/4 318/25 319/1 trustworthiness [1] 238/3 try [8] 222/4 232/5 260/23 283/14 292/24 384/20 386/16 400/7 trying [15] 227/18 233/14 244/10 285/3 285/7 336/4 347/11 348/4 348/21 361/14 380/12 380/14 380/23 416/5 423/19 turn [2] 247/20 360/22 turning [5] 261/10 261/11 261/12 269/15 269/18</p>
---	--	--	--

<div>T</div> <div>TV [5] 292/4 292/13 311/5 334/3 363/6</div> <div>tweak [1] 234/14</div> <div>two [34] 221/2 221/21 234/1 244/6 244/16 245/4 245/5 245/8 245/9 263/18 265/16 287/15 304/5 325/21 332/10 332/12 334/4 343/8 355/13 356/6 360/6 361/10 367/3 367/5 367/10 367/24 370/10 388/10 397/16 407/18 408/12 408/21 416/21 424/12</div> <div>two-year-later [1] 356/6</div> <div>type [8] 225/3 233/14 376/23 388/23 388/24 400/1 409/12 417/7</div> <div>types [4] 312/14 349/7 394/13 408/15</div> <div>typical [6] 223/22 225/5 334/3 369/14 375/8 401/17</div> <div>typically [5] 339/15 343/6 343/16 360/14 362/8</div> <div>typo [2] 279/7 365/16</div>	<div>382/22</div> <div>unwilling [1] 405/17</div> <div>up [61] 225/2 225/22 228/19 229/9 229/10 232/1 235/2 235/10 235/12 235/22 240/23 243/9 243/9 244/7 245/1 245/2 253/10 257/23 258/16 258/18 259/4 259/15 261/24 263/7 263/18 267/24 273/12 274/12 289/14 290/14 290/14 299/3 302/8 304/18 308/11 312/10 313/3 313/20 318/15 318/16 330/11 336/3 343/24 345/25 355/14 357/8 361/1 371/20 372/7 374/16 377/15 381/5 383/11 391/1 398/8 410/22 417/3 417/21 426/6 426/13 426/15</div> <div>updated [1] 367/4</div> <div>upon [8] 221/1 339/3 356/19 368/19 378/18 422/1 423/20 423/21</div> <div>us [22] 220/14 220/18 221/23 224/4 242/3 246/17 247/9 255/9 271/17 272/6 274/4 286/23 318/6 329/6 344/1 356/7 363/2 368/23 379/5 399/4 414/25 415/13</div> <div>usage [4] 361/22 388/15 388/16 391/23</div> <div>use [27] 256/12 294/25 294/25 311/20 311/21 311/24 315/16 315/16 321/6 322/25 350/23 355/10 356/5 359/6 360/4 363/8 363/17 365/7 365/19 365/20 366/12 366/22 374/23 390/12 391/2 394/9 415/17</div> <div>used [27] 223/16 239/10 266/6 333/21 339/10 343/13 356/9 357/16 365/13 365/17 365/23 373/12 379/18 379/19 388/22 392/13 396/10 396/12 396/13 396/16 397/10 422/2 422/21 422/25 423/1 423/15 424/11</div> <div>useful [1] 296/3</div> <div>usefulness [1] 363/20</div> <div>uses [6] 266/2 266/4 309/20 336/14 389/8 390/4</div> <div>using [25] 234/1 242/4 242/9 245/12 247/17 254/9 254/12 266/11 270/12 275/10 286/24 299/16 312/4 312/18 357/9 362/3 366/25 368/1 378/6 387/14 390/18 395/19 396/9 408/11 417/22</div> <div>usual [1] 395/16</div> <div>usually [3] 246/16 247/9 339/3</div> <div>utilize [1] 234/7</div> <div>utilizing [1] 252/1</div>	<div>385/21</div> <div>vehicle [1] 374/2</div> <div>vein [1] 237/21</div> <div>vener [2] 239/11 240/6</div> <div>venture [1] 418/11</div> <div>veracity [1] 426/23</div> <div>verbal [21] 253/4 255/11 351/1 351/2 358/19 359/1 359/6 360/4 362/4 362/5 388/1 388/1 390/16 394/5 394/9 394/16 395/6 398/16 399/9 399/13 399/21</div> <div>verbally [2] 360/15 362/9</div> <div>verbatim [1] 357/6</div> <div>verify [1] 423/11</div> <div>VERONICA [5] 219/13 220/14 261/24 304/1 310/22</div> <div>versus [2] 218/5 337/15</div> <div>very [59] 221/10 222/22 223/22 228/21 234/23 234/24 239/17 239/19 239/23 246/10 248/24 250/4 255/16 257/8 258/2 263/1 273/21 280/15 280/19 282/3 286/12 299/6 299/9 299/12 299/14 308/11 316/21 320/19 322/17 322/19 331/2 332/19 333/20 346/17 346/17 346/17 348/21 351/18 360/15 362/9 362/17 365/5 366/4 377/7 380/4 383/3 384/17 386/14 387/24 388/12 391/3 391/3 401/23 404/9 410/25 415/3 417/21 424/24 427/3</div> <div>vibe [2] 230/16 231/12</div> <div>view [5] 236/5 264/4 301/21 337/1 426/17</div> <div>violated [1] 412/15</div> <div>violation [2] 412/2 415/6</div> <div>violations [1] 415/4</div> <div>viral [2] 376/17 377/11</div> <div>visit [1] 265/22</div> <div>visiting [1] 312/6</div> <div>visual [2] 398/2 398/3</div> <div>vividly [1] 351/18</div> <div>vocabulary [8] 226/19 249/7 361/5 362/4 392/8 395/20 396/8 396/18</div> <div>volume [1] 400/13</div>	<div>348/7 349/1 358/23 361/19 413/14 413/19 414/22 414/22 416/20 425/11 426/12</div> <div>wanted [9] 231/24 258/3 277/4 297/20 297/24 318/18 327/24 352/15 406/15</div> <div>wants [2] 242/11 425/6</div> <div>warm [2] 246/18 247/13</div> <div>warn [1] 381/17</div> <div>warning [1] 386/11</div> <div>was [341]</div> <div>Washington [1] 245/15</div> <div>WASI [1] 352/3</div> <div>wasn't [12] 240/5 300/22 312/12 318/17 322/19 345/20 349/2 361/22 381/25 387/3 391/10 420/10</div> <div>watch [3] 284/22 292/4 349/13</div> <div>watching [7] 311/5 363/5 388/18 388/20 388/20 388/21 388/23</div> <div>water [2] 284/17 289/13</div> <div>way [44] 233/6 233/14 234/3 234/6 236/11 240/9 247/21 263/5 268/10 268/13 268/14 271/7 273/16 278/1 280/23 284/21 284/22 289/23 299/20 301/25 301/25 311/2 328/2 330/17 334/12 343/12 366/10 369/15 374/4 374/16 375/5 375/7 381/10 382/13 383/19 388/12 390/11 392/12 398/21 411/24 412/20 414/10 415/11 416/21</div> <div>ways [7] 228/18 244/6 245/8 285/18 287/10 329/8 388/25</div> <div>we [217]</div> <div>we'll [25] 220/20 230/4 230/9 232/13 233/7 243/21 251/20 252/2 269/9 269/24 271/25 276/24 277/24 278/19 289/2 297/16 303/17 307/15 326/5 327/5 393/2 425/8 426/5 426/24 426/25</div> <div>we're [43] 222/7 228/21 230/13 230/17 230/17 241/12 247/21 247/22 248/8 255/22 273/25 274/8 278/1 289/25 292/13 292/19 309/3 313/8 318/21 328/3 346/6 346/8 347/1 347/15 349/14 357/9 381/4 381/7 381/20 383/19 388/14 391/16 391/17 393/13 397/24 401/5 412/6 415/10 416/14 417/10 418/2 420/5 426/15</div> <div>we've [5] 324/6 333/6 364/3 405/23 426/5</div> <div>wear [1] 316/17</div> <div>wearing [3] 300/25 306/3 306/25</div> <div>wears [1] 301/10</div> <div>website [2] 320/6 320/11</div> <div>Wechsler [3] 355/19 396/20 407/6</div> <div>weeks [1] 325/25</div> <div>weight [8] 256/1 256/7 345/11 376/2 379/9 409/14 414/2 414/7</div> <div>welcome [2] 234/24 424/24</div> <div>well [117] 222/3 225/2 225/7 225/9 226/11 227/20 228/21 229/1 229/13 234/4 234/10 236/6 237/16 238/6 239/19 240/8 242/7 243/19 245/4 245/12 245/19 245/22 246/24 247/20 247/25 249/23 251/23 252/20 254/3</div>
<div>U</div> <div>Uh [2] 300/15 418/17</div> <div>Uh-hum [2] 300/15 418/17</div> <div>ULERIO [2] 219/14 220/18</div> <div>ultimately [1] 295/24</div> <div>unable [1] 405/16</div> <div>uncontrollable [1] 403/12</div> <div>uncorrected [1] 368/4</div> <div>under [10] 220/22 249/3 257/11 327/7 328/24 346/5 371/3 387/9 395/25 403/13</div> <div>underachievement [1] 343/7</div> <div>underachieving [2] 343/9 343/9</div> <div>underestimates [1] 371/16</div> <div>underneath [1] 398/19</div> <div>understand [29] 227/4 227/21 233/8 234/12 234/21 242/1 242/13 243/15 244/13 249/9 249/22 249/25 262/15 269/11 277/16 277/18 277/20 287/11 287/12 297/4 297/8 331/17 333/24 349/9 380/11 381/3 384/10 406/5 423/12</div> <div>understanding [15] 251/6 253/2 255/7 269/25 270/9 277/12 285/3 291/25 292/3 308/13 328/15 375/2 390/22 397/3 397/12</div> <div>understands [2] 242/10 307/21</div> <div>understood [1] 400/6</div> <div>undertake [4] 249/7 267/2 267/3 267/6</div> <div>unfortunately [1] 352/22</div> <div>Union [1] 268/16</div> <div>unique [1] 340/25</div> <div>unit [1] 321/24</div> <div>UNITED [10] 218/1 218/2 218/5 218/12 218/15 218/17 220/3 220/8 220/12 220/13</div> <div>universal [3] 230/15 231/9 231/15</div> <div>unless [3] 244/10 391/13 412/25</div> <div>unlikely [1] 263/5</div> <div>unreliable [1] 406/25</div> <div>unrequited [1] 236/23</div> <div>until [6] 227/24 282/1 349/12 369/5 374/16 385/17</div> <div>unusual [4] 340/9 340/12 341/3</div>	<div>382/22</div> <div>unwilling [1] 405/17</div> <div>up [61] 225/2 225/22 228/19 229/9 229/10 232/1 235/2 235/10 235/12 235/22 240/23 243/9 243/9 244/7 245/1 245/2 253/10 257/23 258/16 258/18 259/4 259/15 261/24 263/7 263/18 267/24 273/12 274/12 289/14 290/14 290/14 299/3 302/8 304/18 308/11 312/10 313/3 313/20 318/15 318/16 330/11 336/3 343/24 345/25 355/14 357/8 361/1 371/20 372/7 374/16 377/15 381/5 383/11 391/1 398/8 410/22 417/3 417/21 426/6 426/13 426/15</div> <div>updated [1] 367/4</div> <div>upon [8] 221/1 339/3 356/19 368/19 378/18 422/1 423/20 423/21</div> <div>us [22] 220/14 220/18 221/23 224/4 242/3 246/17 247/9 255/9 271/17 272/6 274/4 286/23 318/6 329/6 344/1 356/7 363/2 368/23 379/5 399/4 414/25 415/13</div> <div>usage [4] 361/22 388/15 388/16 391/23</div> <div>use [27] 256/12 294/25 294/25 311/20 311/21 311/24 315/16 315/16 321/6 322/25 350/23 355/10 356/5 359/6 360/4 363/8 363/17 365/7 365/19 365/20 366/12 366/22 374/23 390/12 391/2 394/9 415/17</div> <div>used [27] 223/16 239/10 266/6 333/21 339/10 343/13 356/9 357/16 365/13 365/17 365/23 373/12 379/18 379/19 388/22 392/13 396/10 396/12 396/13 396/16 397/10 422/2 422/21 422/25 423/1 423/15 424/11</div> <div>useful [1] 296/3</div> <div>usefulness [1] 363/20</div> <div>uses [6] 266/2 266/4 309/20 336/14 389/8 390/4</div> <div>using [25] 234/1 242/4 242/9 245/12 247/17 254/9 254/12 266/11 270/12 275/10 286/24 299/16 312/4 312/18 357/9 362/3 366/25 368/1 378/6 387/14 390/18 395/19 396/9 408/11 417/22</div> <div>usual [1] 395/16</div> <div>usually [3] 246/16 247/9 339/3</div> <div>utilize [1] 234/7</div> <div>utilizing [1] 252/1</div>	<div>385/21</div> <div>vehicle [1] 374/2</div> <div>vein [1] 237/21</div> <div>vener [2] 239/11 240/6</div> <div>venture [1] 418/11</div> <div>veracity [1] 426/23</div> <div>verbal [21] 253/4 255/11 351/1 351/2 358/19 359/1 359/6 360/4 362/4 362/5 388/1 388/1 390/16 394/5 394/9 394/16 395/6 398/16 399/9 399/13 399/21</div> <div>verbally [2] 360/15 362/9</div> <div>verbatim [1] 357/6</div> <div>verify [1] 423/11</div> <div>VERONICA [5] 219/13 220/14 261/24 304/1 310/22</div> <div>versus [2] 218/5 337/15</div> <div>very [59] 221/10 222/22 223/22 228/21 234/23 234/24 239/17 239/19 239/23 246/10 248/24 250/4 255/16 257/8 258/2 263/1 273/21 280/15 280/19 282/3 286/12 299/6 299/9 299/12 299/14 308/11 316/21 320/19 322/17 322/19 331/2 332/19 333/20 346/17 346/17 346/17 348/21 351/18 360/15 362/9 362/17 365/5 366/4 377/7 380/4 383/3 384/17 386/14 387/24 388/12 391/3 391/3 401/23 404/9 410/25 415/3 417/21 424/24 427/3</div> <div>vibe [2] 230/16 231/12</div> <div>view [5] 236/5 264/4 301/21 337/1 426/17</div> <div>violated [1] 412/15</div> <div>violation [2] 412/2 415/6</div> <div>violations [1] 415/4</div> <div>viral [2] 376/17 377/11</div> <div>visit [1] 265/22</div> <div>visiting [1] 312/6</div> <div>visual [2] 398/2 398/3</div> <div>vividly [1] 351/18</div> <div>vocabulary [8] 226/19 249/7 361/5 362/4 392/8 395/20 396/8 396/18</div> <div>volume [1] 400/13</div>	<div>348/7 349/1 358/23 361/19 413/14 413/19 414/22 414/22 416/20 425/11 426/12</div> <div>wanted [9] 231/24 258/3 277/4 297/20 297/24 318/18 327/24 352/15 406/15</div> <div>wants [2] 242/11 425/6</div> <div>warm [2] 246/18 247/13</div> <div>warn [1] 381/17</div> <div>warning [1] 386/11</div> <div>was [341]</div> <div>Washington [1] 245/15</div> <div>WASI [1] 352/3</div> <div>wasn't [12] 240/5 300/22 312/12 318/17 322/19 345/20 349/2 361/22 381/25 387/3 391/10 420/10</div> <div>watch [3] 284/22 292/4 349/13</div> <div>watching [7] 311/5 363/5 388/18 388/20 388/20 388/21 388/23</div> <div>water [2] 284/17 289/13</div> <div>way [44] 233/6 233/14 234/3 234/6 236/11 240/9 247/21 263/5 268/10 268/13 268/14 271/7 273/16 278/1 280/23 284/21 284/22 289/23 299/20 301/25 301/25 311/2 328/2 330/17 334/12 343/12 366/10 369/15 374/4 374/16 375/5 375/7 381/10 382/13 383/19 388/12 390/11 392/12 398/21 411/24 412/20 414/10 415/11 416/21</div> <div>ways [7] 228/18 244/6 245/8 285/18 287/10 329/8 388/25</div> <div>we [217]</div> <div>we'll [25] 220/20 230/4 230/9 232/13 233/7 243/21 251/20 252/2 269/9 269/24 271/25 276/24 277/24 278/19 289/2 297/16 303/17 307/15 326/5 327/5 393/2 425/8 426/5 426/24 426/25</div> <div>we're [43] 222/7 228/21 230/13 230/17 230/17 241/12 247/21 247/22 248/8 255/22 273/25 274/8 278/1 289/25 292/13 292/19 309/3 313/8 318/21 328/3 346/6 346/8 347/1 347/15 349/14 357/9 381/4 381/7 381/20 383/19 388/14 391/16 391/17 393/13 397/24 401/5 412/6 415/10 416/14 417/10 418/2 420/5 426/15</div> <div>we've [5] 324/6 333/6 364/3 405/23 426/5</div> <div>wear [1] 316/17</div> <div>wearing [3] 300/25 306/3 306/25</div> <div>wears [1] 301/10</div> <div>website [2] 320/6 320/11</div> <div>Wechsler [3] 355/19 396/20 407/6</div> <div>weeks [1] 325/25</div> <div>weight [8] 256/1 256/7 345/11 376/2 379/9 409/14 414/2 414/7</div> <div>welcome [2] 234/24 424/24</div> <div>well [117] 222/3 225/2 225/7 225/9 226/11 227/20 228/21 229/1 229/13 234/4 234/10 236/6 237/16 238/6 239/19 240/8 242/7 243/19 245/4 245/12 245/19 245/22 246/24 247/20 247/25 249/23 251/23 252/20 254/3</div>

<p>W well... [88] 255/24 261/22 263/14 266/17 270/2 271/24 272/20 272/24 273/21 273/23 274/25 275/11 275/16 276/24 281/16 283/4 289/6 289/8 292/23 293/4 295/7 297/6 298/8 300/22 303/8 304/25 306/23 309/1 310/4 310/17 310/18 310/19 313/9 316/2 320/7 320/9 320/23 321/1 322/21 324/19 334/9 334/19 334/23 334/24 335/4 337/4 339/9 341/25 343/5 347/24 348/11 348/24 348/24 350/13 355/10 359/11 364/20 365/12 370/11 373/11 375/16 377/14 378/8 378/23 379/3 379/10 383/20 385/19 386/17 390/7 391/8 391/21 392/4 392/16 397/10 399/12 399/22 400/11 401/12 405/11 405/23 410/20 414/11 415/25 416/3 422/12 422/16 425/7 went [25] 255/20 275/4 283/3 295/24 296/20 299/19 300/24 314/5 320/13 321/21 322/18 323/9 325/20 333/19 351/20 351/25 351/25 352/5 353/2 367/19 378/3 379/16 409/6 420/17 423/11 were [107] 231/17 248/3 258/4 258/5 258/18 259/5 259/23 275/16 285/12 288/4 299/2 299/19 302/18 302/22 302/24 302/24 302/25 303/7 303/17 308/2 311/9 311/23 312/18 318/9 318/11 318/12 320/23 323/5 323/16 323/18 325/3 328/2 328/9 330/21 330/25 331/1 338/20 341/7 341/8 341/9 341/15 346/21 346/22 348/4 351/13 353/18 353/20 355/1 356/20 357/22 358/14 358/19 358/25 361/21 363/21 364/10 364/23 366/9 367/5 368/4 368/4 368/5 368/5 369/16 369/19 369/22 371/25 373/6 375/23 375/23 375/24 376/9 376/11 378/11 378/18 379/13 379/22 379/22 379/24 380/9 385/9 386/23 386/24 387/12 391/23 395/11 396/12 396/14 397/10 397/16 400/13 407/19 408/2 408/2 409/23 410/4 410/11 410/12 411/14 417/2 419/10 419/14 419/22 420/1 422/15 422/16 423/12 weren't [5] 311/8 311/10 344/24 379/13 380/9 Western [1] 268/16 what [241] what's [15] 228/25 233/11 237/3 237/4 245/3 250/21 284/9 285/7 286/18 292/8 293/10 304/15 330/8 362/14 384/13 whatever [7] 222/12 222/15 303/21 361/19 388/2 417/18 425/12 whatsoever [1] 388/22 when [136] 224/6 226/10 227/3 228/17 232/18 233/12 233/17 234/6 234/11 235/8 235/9 235/17 238/2 239/6 239/11 239/20</p>	<p>240/10 243/9 246/15 246/22 251/4 253/1 253/14 258/15 258/18 263/23 267/9 268/7 268/15 269/9 269/21 270/4 270/5 270/5 273/6 277/17 277/22 281/14 282/3 282/25 283/11 287/4 289/12 292/19 293/8 294/10 294/18 295/12 296/20 299/12 299/19 300/22 301/4 302/18 302/22 303/6 305/20 307/25 308/2 309/23 314/10 314/14 314/15 314/16 315/7 316/1 316/13 316/16 318/3 321/1 321/3 323/20 323/24 324/11 324/15 327/11 327/25 328/2 331/6 333/16 337/19 339/13 346/14 346/16 348/4 352/14 353/18 353/19 354/24 354/25 357/22 357/25 358/20 361/13 361/18 365/15 365/19 367/3 367/6 367/14 368/5 368/6 368/24 368/24 372/3 374/13 374/16 375/15 375/23 377/6 377/8 380/18 383/6 386/19 389/6 391/21 394/6 395/17 396/7 401/5 403/1 403/15 405/7 405/11 405/13 406/1 406/8 406/9 406/23 411/1 412/4 417/10 418/22 420/6 420/9 423/7 whence [1] 392/12 whenever [1] 318/18 where [60] 224/7 226/7 230/22 232/6 232/6 232/10 243/12 245/9 247/23 251/11 251/13 255/8 280/21 281/12 290/3 292/5 305/24 311/18 312/9 313/2 313/2 313/25 318/10 320/11 321/16 323/5 323/20 342/22 343/18 343/22 343/23 344/6 344/10 347/7 349/16 350/10 352/2 365/2 365/22 367/5 369/23 370/2 383/9 391/19 396/4 396/14 403/15 406/22 407/5 407/18 407/18 407/19 408/9 408/13 409/13 415/10 416/21 417/2 417/15 425/8 whereas [2] 368/19 391/4 Whereupon [2] 256/14 427/6 wherever [1] 425/6 whether [59] 228/2 249/24 251/24 252/2 252/3 256/6 256/6 258/16 263/10 269/6 287/4 288/20 292/1 294/4 297/8 308/8 312/24 334/10 338/8 343/10 345/10 347/21 355/8 356/20 358/24 359/4 359/6 363/22 364/10 377/17 379/15 381/4 381/6 381/7 381/23 382/12 383/14 386/21 388/17 388/19 388/22 389/2 390/21 395/11 405/17 407/20 408/12 408/24 409/11 409/11 410/5 412/9 412/13 412/14 412/20 413/24 414/25 415/22 418/12 which [100] 222/6 224/22 230/4 233/23 238/6 240/9 243/20 245/23 247/15 247/15 247/18 255/6 256/4 259/3 267/6 268/6 272/3 272/23 280/6 281/3 281/24 283/22 285/22 287/4 300/18 301/22 316/25 318/1 318/2 319/4 330/4 330/17 334/3 334/4 334/12 342/14 343/13 343/20 345/4 346/6 349/24 352/3 353/17</p>	<p>354/22 355/24 356/6 359/5 359/23 362/1 362/14 363/6 367/8 365/1 365/5 366/11 368/12 369/24 370/6 375/5 376/4 378/10 379/20 380/3 380/24 384/23 386/4 386/23 393/23 397/3 397/11 397/12 397/15 398/2 398/10 400/1 400/2 400/21 401/13 402/18 402/18 403/24 406/15 406/16 407/24 408/7 409/2 411/4 411/10 414/4 414/6 414/7 414/14 415/6 415/7 415/16 416/1 418/14 423/11 423/25 424/7 while [11] 242/3 280/16 280/16 290/18 314/8 315/15 316/15 334/22 335/24 344/13 393/13 white [3] 230/16 231/12 305/6 who [66] 225/20 225/24 226/15 227/10 230/7 234/20 241/22 247/17 252/20 254/5 282/8 282/12 282/14 287/2 287/5 289/14 290/21 293/22 297/6 297/10 297/11 297/22 301/9 301/10 315/7 315/10 318/13 318/24 321/18 324/2 324/7 328/16 328/20 330/24 331/24 331/25 334/17 335/17 339/5 339/15 340/3 340/6 343/9 344/1 344/16 355/18 357/17 366/13 366/20 371/15 376/11 377/14 385/14 391/9 394/15 394/22 395/16 396/14 401/25 405/11 405/19 405/20 423/5 425/17 426/1 426/6 who's [12] 228/7 228/7 265/3 315/3 329/3 337/4 337/14 380/6 388/18 405/7 421/3 423/15 whole [8] 265/17 286/15 294/23 308/20 346/18 347/13 373/22 394/4 whom [1] 390/23 whoops [1] 271/3 why [50] 222/3 224/23 224/24 230/8 232/3 237/9 237/14 237/21 237/23 238/2 241/11 242/8 248/2 255/20 255/21 265/21 277/1 277/6 277/9 282/5 283/4 287/4 287/7 287/10 295/24 303/8 335/4 344/13 347/3 350/3 351/7 363/25 375/1 378/4 381/6 382/1 385/3 385/4 391/5 394/4 399/4 405/10 408/14 408/15 408/16 413/3 414/15 417/3 423/11 425/7 wide [3] 382/15 384/17 385/21 widely [1] 355/21 wider [1] 267/25 will [29] 229/5 234/7 240/18 240/22 240/23 245/25 255/2 256/4 258/17 271/19 274/18 284/12 284/13 320/12 328/13 339/3 343/6 352/22 354/7 371/8 384/20 386/16 386/17 390/2 391/20 393/6 425/22 426/8 426/9 willful [1] 405/15 Williams [1] 334/4 willing [2] 235/9 337/4 WILSON [146] 218/6 220/9 225/9 225/16 225/18 230/18 235/14 235/25 236/18 236/24 239/2 239/25 241/23 241/24 242/4 244/5 244/15 244/19 246/13 246/20 246/22 249/6</p>	<p>252/10 253/7 255/21 260/1 261/9 265/23 265/23 265/23 266/12 266/12 267/13 269/3 269/12 269/14 271/6 271/8 272/17 272/24 274/2 277/12 278/22 279/15 280/23 281/12 284/24 285/14 289/3 290/21 291/10 291/25 292/8 293/14 295/4 295/25 296/5 296/15 297/3 297/20 297/23 298/12 298/22 299/9 300/7 301/8 304/25 305/5 305/8 305/18 305/19 306/20 306/22 307/6 307/9 307/21 309/5 309/24 311/4 311/14 311/20 312/9 313/25 314/15 314/17 315/15 316/1 316/16 317/10 317/13 319/13 319/17 319/24 320/1 320/19 321/11 321/17 321/23 322/4 322/9 322/9 322/17 323/10 323/12 327/22 328/5 329/3 329/10 330/3 331/15 331/24 333/16 334/12 338/8 347/9 348/13 350/1 350/4 358/15 361/13 363/22 364/4 366/4 367/3 368/6 372/10 374/12 375/15 376/12 376/16 377/7 378/11 382/14 384/24 389/4 390/11 394/23 395/15 396/3 399/11 404/21 405/3 407/19 411/1 420/9 420/12 Wilson's [24] 221/14 230/6 254/3 254/9 254/19 268/2 273/9 293/25 297/18 298/15 304/25 313/23 314/11 318/9 318/14 319/24 324/24 330/25 332/1 351/1 377/19 378/1 382/10 386/22 wine [5] 261/23 262/7 263/15 264/1 264/4 wire [1] 324/19 wires [1] 425/10 WISC [10] 353/21 355/3 357/10 357/14 357/21 366/4 367/4 395/4 408/7 411/11 WISC-3 [1] 411/11 WISC-C [2] 355/3 367/4 WISC-III [4] 353/21 357/10 357/14 357/21 WISC-R [1] 366/4 wise [3] 257/16 325/25 326/2 withdraw [2] 274/15 333/15 withdrawn [4] 253/12 318/7 330/18 419/13 within [9] 251/15 287/1 338/14 349/2 353/20 366/10 397/7 397/24 419/24 without [23] 221/10 229/25 233/1 236/7 237/7 238/16 241/15 244/1 246/5 253/21 267/22 270/25 276/19 284/3 289/23 299/24 313/18 315/5 317/6 319/10 327/19 357/2 367/17 witness [38] 220/21 227/23 241/5 241/6 255/10 255/15 257/2 257/3 257/11 257/15 257/22 259/7 265/10 265/14 265/14 290/17 291/5 302/14 304/17 306/10 325/18 327/6 327/6 335/11 345/7 347/20 347/24 360/23 379/11 384/17 393/6 393/9 424/21 425/9 425/20 426/6 426/16 426/18 witness' [2] 344/24 349/3</p>
---	--	---	--

W	293/21 296/3 298/24 299/11	219/7 220/4 225/23 292/5 328/14
witness's [1] 220/20	300/18 308/12 308/25 309/20	you'd [3] 250/19 252/20 422/22
witnesses [6] 381/5 425/3 425/5	310/6 310/7 312/14 312/24	you'll [3] 280/5 280/5 413/15
425/16 425/18 428/2	314/15 314/16 316/1 317/23	you're [79] 224/5 233/18 234/24
witty [1] 250/19	321/15 324/2 325/8 325/9 325/10	235/9 236/10 243/11 245/5 245/6
wobble [1] 416/8	328/14 332/14 332/15 335/4	250/1 252/1 253/4 253/7 262/11
woman [24] 238/25 238/25	341/10 343/22 343/23 343/24	263/19 266/8 268/16 272/4 277/7
239/2 239/23 239/23 241/22	344/6 344/14 344/18 346/18	277/21 277/22 281/1 281/5
241/23 241/24 260/2 261/14	346/24 347/23 348/9 353/25	282/25 282/25 283/11 283/12
261/14 267/10 290/21 291/11	357/19 360/22 363/12 375/8	286/14 286/22 287/9 288/4
291/12 297/16 307/16 329/3	379/20 386/25 387/1 387/2 387/2	288/13 290/9 290/18 293/10
331/24 334/13 335/18 391/9	387/3 387/9 387/16 388/11	295/14 296/6 297/10 300/20
391/12 392/13	390/10 390/16 396/11 399/15	301/24 309/23 310/12 319/18
women [7] 233/11 242/5 261/22	400/1 401/2 401/3 401/4 401/7	321/9 323/24 324/16 324/21
262/9 263/25 264/4 292/24	405/18 413/2 413/24 417/22	327/22 328/2 354/21 358/22
won't [6] 268/14 272/2 273/11	418/2 418/11 418/20 418/21	368/24 368/25 371/1 371/2 371/6
277/4 311/3 317/12	424/15 426/21	371/8 381/9 381/10 381/10
Wonder [2] 316/8 316/9	would've [2] 424/13 424/14	381/21 381/21 381/22 384/7
Woods [1] 340/6	wouldn't [12] 224/23 237/9	386/12 392/11 394/8 404/14
word [4] 233/25 330/8 362/10	237/22 237/23 253/8 294/18	408/9 408/11 410/20 412/4
408/9	294/22 310/5 310/6 321/8 337/2	414/17 416/5 417/16 417/18
words [33] 226/23 238/23	391/13	418/22 419/25 423/2 424/24
239/11 242/9 242/10 243/11	Wow [1] 272/5	you've [18] 223/9 224/10 236/10
277/12 292/12 294/25 297/10	write [10] 225/20 234/15 330/1	239/10 257/6 267/5 293/17
310/9 310/20 320/13 333/21	368/21 369/3 369/8 390/13 395/8	315/12 320/25 333/9 343/8 372/5
346/7 363/8 364/6 378/19 378/20	404/3 407/14	378/21 384/2 388/5 392/9 393/25
387/10 388/13 388/15 388/18	writes [1] 329/4	415/14
390/24 392/9 392/13 396/10	writing [10] 239/20 248/25	young [19] 230/16 231/12 282/4
396/12 396/13 396/14 396/24	277/17 303/20 330/13 356/11	286/13 291/11 291/12 299/6
408/10 420/1	358/3 358/18 390/11 408/10	300/1 301/9 306/21 320/23 339/6
work [36] 222/4 222/11 242/2	writings [1] 359/2	369/18 377/7 377/11 388/12
242/18 259/16 272/17 280/12	written [9] 245/3 247/3 253/5	388/13 388/15 388/19
280/22 280/24 282/1 308/11	355/19 358/15 362/14 378/20	younger [1] 318/12
322/8 322/10 322/13 322/14	403/16 407/19	your [225]
322/16 322/19 322/24 322/25	wrong [11] 233/11 246/15 277/8	yourself [1] 300/19
323/1 323/7 323/13 323/15	286/4 319/15 349/7 373/11 379/8	youth [3] 311/4 398/20 402/5
323/16 324/25 325/1 325/2 325/5	386/25 387/1 387/9	
325/6 325/8 325/10 339/17	wrote [9] 246/23 246/25 247/1	
339/18 339/19 355/21 426/7	300/11 352/15 369/9 370/2	
worked [4] 222/14 323/10	409/22 410/17	
339/23 420/20		
workers [1] 340/18	Y	
working [12] 230/17 230/17	y'all [6] 233/13 233/16 235/7	
280/16 308/4 320/18 323/17	271/15 271/16 274/3	
327/23 339/20 375/7 387/4	Yeah [23] 221/16 234/8 234/14	
416/14 420/22	236/20 259/14 261/19 261/19	
workout [12] 254/6 307/10	265/24 265/24 268/3 271/12	
307/12 307/16 307/21 308/5	297/2 312/22 316/14 328/23	
308/7 308/8 308/11 308/13	358/24 377/22 379/1 381/2	
308/18 308/20	381/16 392/20 394/9 412/11	
workouts [1] 308/1	year [14] 273/21 298/1 314/20	
works [2] 297/4 375/8	356/6 395/16 396/11 400/21	
workup [4] 400/20 401/9 401/11	401/22 401/22 402/22 402/22	
401/12	404/18 405/7 417/4	
world [6] 282/17 301/21 302/1	Year's [1] 349/13	
363/7 390/19 391/17	years [20] 300/14 313/24 335/4	
worms [1] 346/18	366/25 367/3 367/6 368/6 369/6	
worried [1] 425/2	374/13 377/15 383/7 384/24	
worry [1] 425/8	385/14 403/1 415/24 417/4 417/5	
worst [1] 246/12	417/15 420/12 424/12	
worth [4] 349/19 386/5 406/11	years' [1] 386/5	
406/12	yellow [2] 274/10 274/12	
would [111] 221/3 222/11	yes [229]	
224/22 225/5 227/10 227/16	yesterday [19] 220/25 221/14	
230/24 232/2 232/3 232/8 234/15	223/14 224/18 237/12 237/19	
236/17 237/20 240/6 242/19	239/10 248/3 255/15 258/5	
243/5 247/18 248/4 249/1 249/24	258/11 258/16 258/18 260/25	
250/18 251/23 253/10 255/12	266/14 275/17 288/7 295/3 423/7	
259/9 264/19 264/23 268/9 272/6	yet [4] 271/19 274/17 402/9	
274/10 277/15 281/13 281/15	402/12	
282/13 286/25 287/5 287/7 289/5	yielded [2] 397/5 397/14	
290/9 290/10 290/11 291/22	YORK [11] 218/1 218/15	
	218/16 218/21 218/21 219/7	